82-7009

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

IVON RAY STANLEY,

Petitioner,

- v -

WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the failure of appointed trial counsel to put in any evidence in mitigation on petitioner's behalf in the punishment phase of trial, though ample evidence was at hand, violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. Whether petitioner's incriminating statement was improperly introduced at trial.

3. Whether the decision below conflicts with Godfrey v. Georgia, 446 U.S. 420 (1980).

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Petitioner IVON RAY STANLEY, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATION TO OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit, the United States District Court for the Middle District of Georgia, the Superior Court of Butts County, and the Supreme Court of Georgia are set out in the Appendix, infra, at pp. 1a, 28a, 38a and 44a, respectively. The opinion of the Supreme Court of Georgia is reported at 240 Ga. 341. The other opinions are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 10, 1983. A timely petition for rehearing was denied on May 3, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and is asserting herein deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to ... have the assistance of counsel for his defense."

and the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

1. Course of Proceedings in the State Courts and in the Court Below.

On January 15, 1977, petitioner was convicted in the Superior Court of Decatur County of felony murder, kidnapping

with bodily injury, and armed robbery. By a final judgment entered on the same date, he was sentenced to death upon each of the three convictions. On November 28, 1977, the Supreme Court of Georgia set aside the conviction for armed robbery, affirmed the other convictions, and affirmed the sentence of death. 240 Ga. 341, 241 SE2d 173 (1977); App., infra, p. 44a. On May 14, 1978, a petition for certiorari to the Supreme Court of the United States was denied. Stanley v. Georgia, 439 U.S. 882 (1978).

The Supreme Court of Georgia issued remittitur to the Superior Court of Decatur County, and on January 15, 1979 that court set February 2, 1979 as the date for execution of petitioner's death sentence.

Petitioner thereupon filed a petition for a writ of habeas corpus in the Superior Court of Butts County. The Court stayed the execution of the death sentence pending determination of the habeas petition. After an evidentiary hearing, the writ was denied on July 26, 1979 with an opinion by the Hon. R. Alex Crumbley. App., infra, p. 38a.

The Supreme Court of Georgia denied a certificate of probable cause to appeal, and a subsequent petition for certiorari was denied by the Supreme Court of the United States, 444 U.S. 1103 (1980).

Petitioner then filed a second petition for a writ of habeas corpus in the Superior Court of Butts County. Judge Crumbley denied the petition on October 14, 1980, and the Supreme Court of Georgia denied an application to appeal on October 16, 1980.

The petition for a writ of habeas corpus was filed in the United States District Court on October 16, 1980. It was denied on June 12, 1981 by Judge J. Robert Elliott with an

opinion. App., infra, p. 28a. Notice of appeal was filed on July 9, 1981. On July 20, 1981, Judge Elliott issued a certificate of probable cause and an order staying execution of appellant's sentence of death pending this appeal. The United States Court of Appeals for the Eleventh Circuit affirmed on February 10, 1983, one judge dissenting, App., infra, p. 1a, and on May 3, 1983 denied a timely application for rehearing and rehearing en banc.

2. Statement of Facts.

At the punishment phase of trial, petitioner's appointed attorney put forward no evidence whatever in mitigation. All he did was to make a speech to the jurors urging them to be merciful to his client. He also said of himself that:

> I have done my duty. I'll walk out of this courtroom today feeling that I have even gone overboard against my friends, against those I sit in church with, against those I have sat in the lodge with, against those I have broken bread with.[1]

At the state habeas hearing, petitioner's mother, his grandmother, his brother, two second cousins, and an old family friend testified on his behalf.

Petitioner's mother, Mrs. Evelyn Stanley, testified that she came up from Florida to be present at petitioner's trial, accompanied by her second son, Jeffrey, and the assistant pastor of petitioner's church, Mr. Waters (H. 25-26).[2] Though court-appointed counsel had once mentioned character witnesses to her (H. 26), he did not refer to such witnesses

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[1] The attorney's entire address to the jury is set out in the Appendix, infra, p. 62a.

[2] The symbol "H" refers to the transcript of the state habeas hearing.

at the time of trial (H. 26-27), and never mentioned the term "mitigation" to her.

Mrs. Stanley also testified that, while growing up, her son had never been in trouble, had never been arrested, was not a problem in school, never stole, never hurt anyone, and that he attended church (H. 17-19). She produced a letter from the Pastor of her son's church (Petitioner's Exh. 1; H. 19) which stated, among other positive things, that when he learned of petitioner's conviction, he was "overwhelmed because it didn't portray the image I saw him as." She also produced a 1973 high school report (Petitioner's Exh. 2; H 25) which indicated that he son's character was thought to be excellent in every respect.

Mrs. Stanley confirmed that she did not testify to any of these facts concerning her son after the jury brought in its verdict of guilty against him, and that her only testimony was to read a letter during the trial (H. 27).

Petitioner's second cousin, Mrs. Linda Thompson, also testified at the habeas hearing. Mrs. Thompson is a high school teacher in Atlanta with a master's degree (H. 35). She grew up with petitioner and knew him as "A very likeable person. Jovial, Obedient. Willing to cooperate with the family. No problems, at all" (H. 36); that he had no instinct for violence, that he never lifted a hand to anyone, was not capable of murder, and was very altruistic (H. 37).

Petitioner's grandmother (H. 40-45), the family friend (H. 46-49), and the other second cousin (H. 49-54), all testified to the same affirmative effect concerning petitioner's character and upbringing.

Petitioner's younger brother testified at the habeas hearing that he knew his brother to be pacific, helpful and

cooperative (H. 55-56). He also stated that he had been present at his brother's trial, had met the court-appointed lawyer, and that the lawyer never said anything to him about testifying for his brother, either before or after the jury came in with a conviction (H. 56-58).

Petitioner himself testified at the habeas hearing. He stated that his court-appointed lawyer had once asked him about people who could testify about his character, that he had given the lawyer names of some people, but it never came up again (H. 62-63). He also specifically remembered that, after the jury came in with its guilty verdict, the lawyer said nothing to him about character witnesses (H. 62-64). Petitioner stated that he never gave his lawyer consent not to put on character witnesses in mitigation of the death sentence.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Certiorari should be granted because the decision below can be profitably reviewed together with Wood v. Strickland, No. 82-1554, in which certiorari was granted on June 7, 1983, 51 U.S.L.W. 3871, for the following reasons.

The record is clear that petitioner's trial counsel failed to render reasonably effective assistance to his client at the punishment phase of trial by failing to attempt to persuade the jury that the death sentence ought not be imposed; by failing to present the jury with effective testimony

in mitigation by his client's mother, brother and minister, who were present in court; by failing in any way to investigate whether other effective witnesses were available to testify in mitigation; and by failing even to discuss the question of mitigation evidence with his client (who never implicitly or explicitly waived his right to have evidence in mitigation presented on his behalf) or with his client's mother, brother and minister, all of whom were present in court. Not only did trial counsel fail to do his duty in those respects, he actually betrayed his client's interests by asking the jurors to forgive him -- the lawyer -- for even having represented petitioner.

In the face of the facts of record, the court below held that counsel's assistance was not constitutionally ineffective, on the grounds that (1) petitioner had the burden of proving that trial counsel's decision to put on no evidence in mitigation was not a conscious strategic decision on his part, and (2) that, in any case, the available mitigation testimony -- by the client's mother, brother, minister and others -- "would have revealed nothing more than general affirmations from family members and friends that Stanley had been, at a time remote from the events giving rise to the charge, a basically good and responsible child and young adult" App., infra, p. 15a.

1. The Burden of Proof

The decision below is wrong in two respects concerning the burden of proof. One, it ought not be on petitioner; two, if it is, petitioner satisfied it.

To impose upon petitioner the burden of showing that trial counsel made a strategic decision to put on no evidence

in mitigation is factually unrealistic and legally hypertechnical. It is factually unrealistic for the very reasons specified by Judge Arnold in dissent in this case App., infra, p. 23a:

> The lawyer himself is obviously the best witness on that subject ... but he is now in an adversary position vis-a-vis his former client. He may be unwilling to cooperate with present counsel. The very point of the proceeding is to challenge his professional conduct. He is much more likely to cooperate and consult with counsel for the State, whose object at the hearing will be to vindicate his conduct.

In the light of that reality, the decision below to impose the burden of proof on the issue upon petitioner, sacrifices substance to form. The allocation of burdens of proof are rational efforts to distribute between the parties the responsibility for establishing elements of their case, without at the same time rendering that responsibility beyond the party's reach. The distribution of burdens of proof is regulated in part by recognition that one party can discharge a particular burden more easily than the other. It is not to say in this case that the fact need not be established, but it should be said -- because it is fairer to say so -- that the State should bear the burden, at least in this capital case, of proving whether or not trial counsel made the conscious choice presently at issue.

There are some mechanical rules about burden. Obviously some necessarily belong to one party, and some to the other. In the case at bar, however, it cannot be said on the basis either of precedent or logic, that the burden must be on petitioner. It is an open question, which was decided incorrectly below.

Furthermore, if the court below is correct as to which party has the burden, it is incorrect in having concluded that petitioner failed to meet it.

The court acknowledged that ineffective assistance can be established without proof from trial counsel himself "where circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy" App., infra, p. 14a. That principle was satisfied in this case, for a natural reading of the record must lead to the conclusion that trial counsel did not make a conscious decision to forego mitigation evidence as a matter of strategy. How could he have? He never even looked into the possibilities, as the record clearly shows. Though he referred once before trial to the possibility of character witnesses with his client, it never came up again. He did not even discuss with his client's mother, brother and minister, all of whom were in the courtroom, the nature of the testimony they might give in mitigation. How can the panel repeatedly speculate on the possibility that trial counsel made a conscious strategic decision when the record establishes that he did nothing to collect any of the facts necessary to make such a decision?

The conclusion below that "the record" shows that defense counsel did in fact contemplate the possibility of a character witness defense at the sentencing stage and that he "explored that possibility" (App., infra, p. 14a), is just fanciful.

2. The Nature of the Available Testimony

The court below dismissed the nature of the testimony which was available for mitigation as mere "general

affirmations" that petitioner was "a basically good and responsible child and young adult." It was wrong to do so, for the fact is that what it disdainfully calls "general affirmations" are in fact the essence of the kind of information which should be brought to the attention of jurors who have to make the profound decision whether a person should be put to death.

In Lockett v. Ohio, 438 U.S. 586 (1978), this Court, emphasizing the importance of mitigating evidence in capital cases, described the nature of such evidence. Among the information which it held was relevant to the individualized decision whether or not to impose the ultimate sentence of death were the "character, prior record, age, lack of specific intent to cause death" (Id. at 597); the "character and record of the individual offender and the circumstances of the particular offense ..." (Id. at 601); and "prospects for rehabilitation" (Id. at 620) (Marshall, J., concurring). In other words, "any aspect of a defendant's character or record and any of the circumstances of the offense ..." (Id. at 604).

Clearly, the court below did not follow this Court's precedents, for its dismissed as unimportant precisely the same information pertaining to a defendant in a capital case which this Court believes was quintessential. The dismissal as inconsequential of information showing that petitioner was "a basically good and responsible child and young adult" (App., infra, p. 15a), is the very evidence of "character and record of the individual offender" declared by this Court to be indispensible evidence in mitigation.

There is some question whether the court below believed that any evidence of history and character could bear on mitigation. Speaking of the testimony by petitioner's

mother at the habeas hearing that he son went to church, the court said that that fact "could well have been perceived by the jury as being aggravating: if Stanley went to church, then he should have known the extreme culpability of his conduct" (App., infra, p. 18a). That attitude gets us nowhere, for if evidence of past goodness is to be characterized as evidence of present evil, then no such information could ever safely be brought to a jury's attention. The notion denies the very possibility as a philosophical matter of any such thing as mitigation. Given the language in Lockett v. Ohio, it is not an admissible notion.

Lastly, the court below attempted further to minimize the significance of the potentiality of the mitigation testimony, as it was produced at the habeas hearing, by stating that "almost without exception these witnesses' testimony consisted of simple 'yes' or 'no' responses to counsel's questions concerning Stanley's character." Undersigned counsel presumes to point out that it was his questions to which those "yes" or "no" answers were given. He also presumes to point out that he knows the difference between making a record in a habeas corpus hearing before a judge, and presenting evidence persuasively in a criminal case to a jury. It would have been done differently at trial.

II.

PETITIONER'S INCRIMINATING STATEMENT WAS IMPROPERLY ADMITTED INTO EVIDENCE.

The crime for which petitioner was convicted was committed on April 12, 1976, and petitioner was arrested on April 14, 1976. He was interviewed at 4:30 p.m. that day by Billy Turner, an agent with the Georgia Bureau of Investiga-

tion. Prior to the interview, petitioner signed a document entitled Waiver of Custody. App., infra, p. 65a.

At that interview, petitioner "denied having anything to do with the murder" (B. 514).

Three days later, on April 17th, a long confessional statement was taken from petitioner by the police, and was later introduced as evidence against him at trial. The statement is in the trial record at B. 148-166. Petitioner had not then consulted a lawyer. Indeed, an attorney was not appointed to represent petitioner until June 22, 1976, more than two months after his arrest (B. 17).

The circumstances surrounding the taking of the statement were the subject of a Jackson v. Denno hearing held on December 6-7, 1976. At that hearing, Billy Turner, the police officer who conducted the interrogation, testified that petitioner was "advised of his Miranda rights" (JD 198-199).[3] Turner explained that he advised petitioner of his rights "by reading from the rights waiver form..." (JD 200), but on cross-examination he added that "I don't know whether he understood it or not" (JD 216). On re-direct, he testified that there was no "question in [his] mind as to whether or not he understood [his] rights" (JD 218).

At the conclusion of the hearing, the trial judge announced, "All right. I'm going to submit the evidence in both of these matters[4] to the jury on the question of voluntariness" (JD 230-231). The judge himself made no finding concerning admissibility, nor is there any order concerning

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[3] References to the transcript of that hearing, which is separately bound, will be made by the symbol "JD."

[4] The other matter was the Jackson v. Denno hearing concerning admissibility of statements made by the other defendant in the case.

such a finding in the record. The evidence at trial concerning the admissibility of the incriminating statement was essentially the same as at the Jackson v. Denno hearing. See Tr. II-93-95, 195-197, 264-265.

Miranda v. Arizona, 384 U.S. 436 (1966), held that, prior to custodial interrogation, the police must inform the prisoner that he has the right to consult with counsel before being questioned, and that is he wants to consult with counsel but is unable to afford one, an attorney will be appointed to represent him prior to interrogation at no cost. In Brewer v. Williams, 430 U.S. 387 (1977), the Court reaffirmed the strict standards required to establish waiver of counsel, both at trial and "at a critical stage of pretrial proceedings" (Id. at 404), including custodial interrogation. The Court held that "waiver requires not merely comprehension but relinquishment..." (Ibid.)

In this case, as the means of advising petitioner of his Miranda rights, the police presented him with and read from a document entitled, "Waiver of Counsel by Defendant in Custody."

Certiorari should be granted to decide whether presentation to a prisoner in police custody of a document entitled "Waiver of Counsel" satisfies the requirement of Miranda that prisoners be meaningfully advised that they have a right to counsel, not a right to waive counsel. The difference is crucial, especially within the inherently coercive atmosphere of police custody, and particularly in a capital case.

III.

GODFREY V. GEORGIA, 446 U.S. 420 (1980), REQUIRES REVERSAL OF PETITIONER'S CONVICTION.

In Godfrey v. Georgia, this Court, in construing the validity of a death sentence under Ga. Code Ann. § 27-2534.1(b)(7), the same section under which petitioner was sentenced to death, held that for (b)(7) to be constitutionally construed and applied, the trial judge's sentencing instructions "must channel the sentencer's discretion by 'clear and objective standards' that provide "specific and detailed guidance,' and that make rationally reviewable the process for imposing a sentence of death" (Id. at 606). The Court set aside Godfrey's death sentence because the trial judge had only "quoted to the jury the statutory language of the § (b)(7) aggravating circumstance in its entirety" (Id. at 405). That, said the Court, was constitutionally inadequate (Id. at 406):

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageous or wantonly vile, horrible and inhuman."

Petitioner's death sentence must also be set aside because his jury was no differently informed about the meaning of (b)(7) than was Godfrey's.

The trial court's entire charge to the jury at the penalty phase of petitioner's trial on the § (b)(7) aggravating circumstance was as follows (Tr. III-103):

> FIVE: "The offenses of murder, armed robbery and kidnapping were outrageously and wantonly vile, horrible and inhuman in

> that the offenses involved Defendant's depravity of mind and torture to the victim."

The trial court failed to define the aggravating circumstance or any of the terms contained therein, and failed even to distinguish among the three "capital offenses" to which the § (b)(7) aggravating circumstance was urged by the State.

The jury's verdict on the § (b)(7) circumstance read: "The offenses of Murder, Armed Robbert and Kidnapping were outrageously and wantonly vile, horrible and inhuman in that the offenses involved Defendant's depravity of mind and torture to the victim." This verdict failed to clarify whether the § (b)(7) aggravating circumstance was found as to each or all of the "capital offenses" charged and it failed so specify whether the § (b)(7) circumstance was dependent on a finding of all three of the "capital offenses" charged.

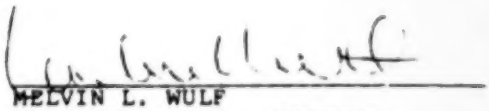
The statutory review of petitioner's sentence of death and the § (b)(7) finding by the Supreme Court of Georgia consisted solely of the following statement: "...the death penalties for both murder and kidnapping in this case are each independently valid under our law and are each amply supported by the evidence." 240 Ga. at 350; App., infra, p. 59.

Since there is no difference between the circumstances surrounding the charge given in Godfrey and in the case at bar, certiorari should be granted to decide whether petitioner's death sentence must be set aside.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,



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June 1983

Ivon Ray STANLEY, Plaintiff-Appellant,

v.

Walter D. ZANT, Warden Georgia Diagnostic and Classification Center, Defendant-Appellee.

No. 81-7615.

United States Court of Appeals, Eleventh Circuit.

Feb. 10, 1983.

State prisoner convicted of murder and sentenced to death filed petition for habeas corpus. The United States District Court for the Middle District of Georgia, J. Robert Elliott, J., concluded that petitioner was not entitled to federal evidentiary hearing and denied petition, and petitioner appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) defendant was not rendered ineffective assistance at his trial on grounds his counsel failed to present any evidence at penalty phase of trial; (2) petitioner's claim of inefficiency in trial court's instruction on statute governing death penalty for commission of crime of murder in atrociously or wantonly vile manner did not provide sufficient justification for habeas corpus relief; (3) waiver of counsel form signed by defendant did not fail to satisfy *Miranda* requirement; and (4) evidence supported conclusion beyond reasonable doubt that defendant had clear intent to kidnap, rob and murder victim so as to negate assertion that death penalty was unconstitutional on ground that defendant took no part in killing.

Affirmed.

Fay, Circuit Judge, filed concurring opinion.

Arnold, Circuit Judge, sitting by designation, filed dissenting opinion.

1. Habeas Corpus ⇐85.2(2)

Habeas corpus petitioner asserting that counsel failed to conduct adequate pretrial investigation has initial burden of making dual showing; as threshold, he must show that his counsel was in fact ineffective, that counsel's conduct was not within range of competence demanded of attorneys in criminal cases, and additionally, petitioner has additional burden of proving his counsel's ineffectiveness caused actual substantial prejudice to his case. U.S.C.A. Const. Amend. 6.

2. Criminal Law ⇐1208(1)

Subject only to loose evidentiary requirement of relevance, capital defendants have right to offer any evidence they choose on character or record or circumstances of offense; further, death penalty scheme must allow sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in death penalty statute.

3. Criminal Law ⇐1208(1)

While sentencing authority may consider only those aggravating circumstances listed in relevant death penalty statute, it may consider any mitigating factors that it wishes.

4. Criminal Law ⇐1208(1)

There is no requirement that any particular kind of mitigating evidence be presented in order for sentence of death to be constitutional. U.S.C.A. Const.Amend. 8.

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5. Criminal Law ⇐641.13(1)

Counsel to which defendant is entitled under Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance given totality of circumstances. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(1)

Defendant is not guaranteed errorless counsel; however, counsel's failure effectively to pursue entire line of defense may in some circumstances transcend individual error category and stamp his overall performance with mark of ineffectiveness. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(1)

Although legal standards of effective representation may remain constant in capital and noncapital cases, seriousness of charges against defendant is factor which must be considered in assessing counsel's performance. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(7)

Special importance of capital sentencing proceeding gives rise to duty on part of defense counsel to be prepared for that crucial phase of trial. U.S.C.A. Const. Amend. 6.

9. Criminal Law ⇐641.13(6)

Scope of counsel's duty to investigate character evidence in capital cases cannot be separated from rule that counsel is not required to present to jury any arguably mitigating character evidence that might exist; having conducted sufficient investigation, counsel may make reasonable strategic judgment to present less than all possible available evidence in mitigation. U.S. C.A. Const.Amends. 6, 8.

10. Criminal Law ⇐641.13(6)

Showing that counsel's decision to forego evidence was not based on reasoned tactical judgment will give rise to ineffective assistance claim; this is as true of character evidence as it is of any other sort of evidence. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(7)

Were trial counsel for capital defendant to testify that he had no strategy whatever for sentencing phase and that he failed to consider or develop possible mitigating evidence, counsel would be deemed ineffective; such claim can be made out, even if trial counsel does not testify, where circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy. U.S. C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(7)

Where investigation into character evidence would have revealed nothing more than general affirmations from family members and friends that defendant had been, at time remote from events giving rise to charge, basically good and responsible child and young adult, and evidence was cumulative of evidence presented during guilt phase of trial, counsel's failure to present character evidence at mitigation phase did not deprive capital defendant of his right to reasonable representation. U.S. C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(7)

Under Georgia law, sentencing jury may consider evidence placed before it during both guilt and punishment phases of trial; thus, while Georgia defendant's trial counsel elected not to offer additional evidence during sentencing phase, record belied assertion that trial counsel made no

effort to place before jury information that might have tended to mitigate jury's view of what defendant's punishment should be, where such evidence was presented during guilt phase. O.C.G.A. § 17-10-30(b); U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(6)

While character witnesses may make critical difference, especially in capital case, their utility in any given case is very much a matter of judgment and trial tactics.

15. Habeas Corpus ⇐25.1(1)

Habeas corpus review focuses on role of great writ as bulwark against convictions that violate fundamental fairness.

16. Habeas Corpus ⇐30(1)

As threshold for Court of Appeals intrusion into state criminal trials, Court of Appeals looks to see that habeas corpus petitioner has shown not merely that errors at his trial created possibility of prejudice, but that they worked to his actual and substantial disadvantage.

17. Habeas Corpus ⇐30(1)

Under instructions given to habeas corpus petitioner's jury, jury could not fix punishment at death unless they found beyond reasonable doubt that defendant's "depravity of mind" resulted in torture to his victim; thus, petitioner's claim of deficiency in trial court's instruction governing sentence of death upon commission of murder outrageously or wantonly vile, horrible and inhuman did not provide sufficient justification for habeas corpus relief. O.C.G.A. § 17-10-30(b).

18. Criminal Law ⇐412.2(5)

Where contents of waiver of counsel form and tape-recorded interview with defendant indicated that defendant was advised fully and correctly of his rights and that he acknowledged that he understood separately with respect to each provision, "waiver of counsel" form did not fail to satisfy *Miranda* requirement that prisoners be meaningfully advised that they had right to counsel, not just right to waive counsel. U.S.C.A. Const.Amend. 6.

19. Homicide ⇐354

Evidence in prosecution for murder, armed robbery and kidnapping with bodily injury, including evidence that defendant himself was overheard long before murder to say that after he and codefendant robbed victim they would have to "get rid of him," was sufficient to allow trier of fact to conclude beyond reasonable doubt that defendant had clear intention to kidnap, rob and murder victim, so that death penalty was not unconstitutional on ground that defendant took no part in killing and tried to discourage codefendant from killing victim. U.S.C.A. Const.Amend. 8.

Appeal from the United States District Court for the Middle District of Georgia.

Before FAY, VANCE and ARNOLD *, Circuit Judges.

VANCE, Circuit Judge:

Ivon Ray Stanley was convicted in the Decatur County, Georgia Superior Court of

* Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

murder, armed robbery and kidnapping with bodily injury and sentenced to death.

On April 12, 1976 Stanley and his codefendant, Joseph Thomas, robbed the victim at gunpoint, took him to the woods, struck his head with a hammer, tied him to a tree, made him lie in a shallow grave, beat and jabbed him with a shovel in the head, throat and chest, shot him in the head and buried him alive while he was still pleading with Stanley and Thomas to stop. Several weeks before the crime the defendants were overheard plotting the robbery. One witness overheard Stanley remark that after the robbery the best thing to do is to "get rid of him."

The Georgia Supreme Court affirmed Stanley's convictions and death sentences for murder and kidnapping with bodily injury. *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977), *cert. denied*, 439 U.S. 882, 99 S.Ct. 218, 58 L.Ed.2d 194 (1978). The court vacated his armed robbery conviction, holding that it was included in the felony murder charge. *Id.*, 240 Ga. at 343, 241 S.E.2d at 176.

Stanley filed a petition for state habeas corpus in the Butts County Superior Court. An evidentiary hearing was held on March 28, 1979, and Stanley was afforded full opportunity to present evidence. He testified and called six other witnesses. All of this testimony related to Stanley's contention that he was denied the effective assistance of counsel in violation of his sixth and fourteenth amendment rights. His petition was denied on July 26, 1979. Certificate of probable cause for appeal to the Georgia Supreme Court and petition for certiorari to the United States Supreme Court were denied. *Stanley v. Zant*, 444 U.S. 1103, 100 S.Ct. 1068, 62 L.Ed.2d 788 (1980). He filed a second state habeas petition in superior court but, with one exception, the court held that the petition presented grounds which could have been presented earlier and were therefore waived. The state court considered one ground, a claim that the jury instructions violated *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), on the merits. The second petition was denied on October 14, 1980, after which Stanley filed his petition in district court.

The district court found that Stanley had been given a full and fair hearing in state court and that such findings were fully supported by the record. It concluded that Stanley was not entitled to a federal evidentiary hearing and denied the petition. Stanley now appeals that judgment.

On appeal to this court Stanley presents four contentions: (1) that he was denied the effective assistance of counsel by his appointed lawyer's failure to present any evidence of mitigation in the penalty phase of trial; (2) that the jury instructions violated *Godfrey*; (3) that his incriminating statement was improperly received in evidence; and (4) that imposition of the death penalty where there was no purpose to cause the victim's death is unconstitutional. We will consider the contentions in the order presented.

(1)

Ineffective Assistance of Counsel at the Sentencing Phase

Stanley asserts that the only theory available to defense counsel that might have saved his client from the death penalty was that Stanley did not participate in the actual torture slaying but that he rather attempted to persuade Thomas to let the victim live. Stanley so testified at the guilt phase of the trial. Defense counsel produc-

ed no character evidence that might have made the theory more credible, nor did counsel produce any corroborative character evidence to supplement Stanley's own testimony about his background and personal history. At the state habeas hearing, Stanley's mother, his grandmother, his brother, two second cousins, and an old family friend testified on his behalf about his character and personal history. Stanley argues that by failing to present any of this evidence in mitigation, even though these competent witnesses were easily obtainable and willing to testify, and by failing to explore the possibilities, his trial counsel failed to provide the minimally effective assistance of counsel required by the sixth amendment.

[1] The framework for analyzing claims of constitutionally ineffective assistance of counsel in this circuit was set forth in the en banc opinion in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir.1982) (Unit B en banc). Under *Washington v. Strickland*, a petitioner asserting that counsel failed to conduct an adequate pretrial investigation has the initial burden of making a dual showing. As a threshold requirement, he must show that his counsel was in fact ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); *Mylar v. State*, 671 F.2d 1299, 1301 (11th Cir.1982), *petition for cert. filed*, — U.S. ——, 103 S.Ct. ——, 74 L.Ed.2d —, 50 U.S.L.W. 3984 (U.S. June 7, 1982) (No. 81-2240). This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of the analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" to his case. Because we hold that Stanley has failed to prove that his trial counsel was ineffective, we need not reach the issue of prejudice.

Petitioner's ineffectiveness argument proceeds on two levels. Stanley first contends that the Supreme Court's death penalty cases require that the sentencing authority consider all available aspects of the character and personal history of the defendant. From this proposition flows the logically necessary corollary that counsel's failure to present any evidence in mitigation constitutes per se ineffective assistance. Should this absolutist position prove unavailing, Stanley adopts the fallback argument that, under the facts of this particular case, counsel's failure to offer evidence in mitigation rose to the level of ineffectiveness. While we have no difficulty rejecting Stanley's initial position, we are more concerned by Stanley's allegations of ineffective assistance of counsel under the specific circumstances of his case.

Stanley argues initially that the Supreme Court decisions in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), require a rule creating an absolute duty to investigate and present mitigating character evidence in every capital case. His reliance on these cases is misplaced. The plurality in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), concluded that the sentencing process must allow consideration of the "character and record of the individual offender and the circumstances of the

particular offense." 428 U.S. at 304, 96 S.Ct. at 2991.[1] The Court held unconstitutional the mandatory death penalty statute used in North Carolina, which failed to allow any such consideration. The opinion did not address the duty of counsel to present such testimony, nor did it suggest that counsel's strategic decision not to present such evidence would be deemed per se unreasonable.

The Supreme Court elaborated on *Woodson* in *Lockett v. Ohio*. The Ohio death penalty statute did not permit the sentencing judge to consider, as mitigating factors, Lockett's character, prior record, age, lack of specific intent to cause death, or her relatively minor part in the crime. The *Lockett* plurality concluded that in all but the rarest kind of capital cases, the eighth and fourteenth amendments require that the sentencer "not be *precluded* from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the *defendant proffers* as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (emphasis partially added) (footnote omitted). This result was necessary because "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605, 98 S.Ct. at 2965. *Lockett*, when combined with cases such as *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976) (holding that the discretion of the sentencer must be guided by "objective standards so as to produce nondiscriminatory application"), means that the sentence of death may only be proper under a system allowing guided individualization.[2]

The *Lockett* holding that the sentencer must give "independent mitigating weight"

1. The *Woodson* plurality explained:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> ... While the practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (citation omitted).

2. The *Lockett* requirement of individualized sentencing had its genesis in the death penalty cases decided by the Supreme Court on July 2, 1976: *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944.

> [T]he plurality [in the 1976 cases] held that the fundamental respect for humanity identified in *Gregg* as the source of substantive requirements also indispensably requires consideration of the character and record of the individual defendant and the circumstances of his offense. It applied this preliminary holding by determining whether each statute had a mechanism whereby a defendant could bring individualized information to the attention of the sentencing authority. The statutes found constitutional all permit-

to factors not included in the statutory list [3] was recently reaffirmed in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 874–76, 71 L.Ed.2d 1 (1982). Eddings introduced in mitigation "substantial evidence . . . of his troubled youth" and emotional disturbance. *Id.* 102 S.Ct. at 872. The Supreme Court reversed the sentencing judge's refusal to consider this evidence in mitigation, stating that "[b]y holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Id.* 102 S.Ct. at 875.

[2, 3] These cases establish that, subject only to the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense. Further, a death penalty scheme must allow the sentencing authority to consider and give independent weight to mitigating factors in addition to those listed in the death penalty statute. The cases thus

> ted consideration of any mitigating circumstances the defendant might seek to establish, while those held unconstitutional failed to provide for consideration of the character and record of the individual defendant.
>
> Liebman & Shepard, Guided Capital Sentencing Discretion Beyond the "Boiler Plate" Mental Disorder as a Mitigating Factor, 66 Geo.L.J. 757, 772 (1978) (footnotes omitted) (cited with approval, *Washington v. Watkins*, 655 F.2d 1346, 1373 n. 52 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)). *See also Jurek*, 428 U.S. at 271, 96 S.Ct. at 2956; *Proffitt*, 428 U.S. at 250–52, 96 S.Ct. at 2965–66; *Gregg*, 428 U.S. at 189, 196–97, 96 S.Ct. at 2932, 2936. Two years later, the Court in *Lockett* compared the Ohio statute with the statutes upheld in *Gregg*, *Proffitt* and *Jurek*, noting that none of the three death penalty statutes sustained in 1976 "clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." 438 U.S. at 607, 98 S.Ct. at 2965.

3. *See, e.g., Washington v. Watkins*, 655 F.2d at 1375:

> The fatal flaw in *Lockett* was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.

Two commentators wrote of *Lockett*:

> The vice of the Ohio statute was that the sentencing authority could consider mitigating factors such as the defendant's age, minor role in the offense, and lack of specific intent to cause death only if they shed light on one or more of the statutory mitigating circumstances. Thus, they could not in themselves affect the sentencing determination. Even though the sentencing authority could hear the mitigating evidence, the structure of the sentencing procedure prevented the sentencer from giving independent mitigating weight to the proffered aspects of character, record, and offense.
>
> The *Lockett* decision thus resolved the ambiguity in the 1976 Death Penalty Cases and made clear that a capital defendant has an eighth amendment right to a sentencing authority with the power to consider any and all aspects of the defendant's character, record, and offense that the defendant wishes to proffer as mitigating circumstances. The *Lockett* decision thus does more than merely expand the number of factors that must be considered by a capital sentencing authority; it alters the process by which that authority must consider those factors. The real significance of the decision lies in its requirement that the sentencer give all mitigating factors offered by the defendant independent mitigating weight.
>
> Hertz & Weisenberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Calif.L.Rev., 317, 326, 332 (footnotes omitted). *See also* Gillers, *Deciding Who Dies*, 129 U.Pa.L.Rev. 1, 32–39 (1980) (arguing that the message of Lockett's "independent weight" request is that the legislatures may no longer tell the sentencing body how to treat the mitigating evidence that it does receive).

create an asymmetry weighted on the side of mercy: while a sentencing authority may consider only those *aggravating* circumstances listed in the relevant statute, *Proffitt v. Wainwright*, 685 F.2d 1227, 1266–70 (11th Cir.1982), it may consider any *mitigating* factors that it wishes.[4]

Although we give full recognition to the rule of *Woodson*, *Lockett* and *Eddings* that the eighth and fourteenth amendments require defendants to have the opportunity to present any evidence in mitigation, we cannot draw from these cases a corresponding duty on defense counsel to present general character evidence in every capital case. Acknowledgement of the importance of character testimony and the right to have it considered by the sentencing body when presented does not of itself speak to the duty of counsel. As we discuss below, the posture of a given case may well justify, if not require, an effective attorney to *refrain* from presenting such evidence.

4. As the fifth circuit explained in *Washington v. Watkins*:

> Equally as important may be the jury's subjective, unarticulable perceptions of Washington. In their separate opinions in *Lockett*, Justices White and Rehnquist argued that the plurality was returning to the unguided jury discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). . . .
>
> However, the *Gregg* plurality was careful to note that "[n]othing in any of our [death penalty cases] suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. at 199, 96 S.Ct. at 2937. The exercise of mercy, of course, can never be a wholly rational, calculated, and logical process. From these premises, other commentators have argued that "*Lockett* is entirely consistent with *Furman* and the 1976 Cases, because it grants broad sentencer discretion only on the mitigating and not on the aggravating side of the sentencing equation." Hertz & Weisberg, [*supra*]. To amplify:
>
> The *Gregg* decision essentially holds that the state cannot execute a defendant unless it establishes, according to constitutionally sufficient criteria of aggravation and according to constitutionally mandated procedures, that capital punishment is appropriate for that defendant. Nothing in *Gregg*, however, requires the state to execute defendants for whom such a finding is made. The sentencing authority can find that mitigating circumstances established by defense evidence outweigh such aggravating factors. It can also invoke whatever standards it wishes—objective or otherwise—to nullify the significance of any state proof of aggravation.
>
> *Id.* at 375 (footnote omitted). In this view, *Lockett* does indeed create an asymmetry in the channeling of jury sentencing discretion. That asymmetry is offensive, however, only if one assumes that the grant of mercy to some based on their particularized circumstances, somehow abridges the constitutional rights of others whose particular circumstances do not inspire mercy. It may well be that the *Lockett* plurality does not share that assumption with Justices White and Rehnquist.

655 F.2d at 1376 n. 57. Hertz & Weisberg, *supra* note 3, conclude that "there is a central distinction for eighth amendment purposes between the decision to impose a death sentence and the decision to afford mercy." *Id.* at 375. *But see* Gillers, *supra* note 3, at 29, 30 (arguing that perhaps "recognizing that an 'arbitrariness' theory is useful at the fringes, but weaker at the core, *Lockett* shifted the inquiry from the avoidance of arbitrariness to what may be called its opposite, the recognition of 'uniqueness' . . . *Lockett*, while acknowledging the arbitrariness analysis of *Furman* and *Gregg* (insofar as it relied on *Furman*), had to sidestep both"); Berns, For Capital Punishment 184 (1979) ("Thus, having begun in 1972 in *Furman v. Georgia* by complaining of the capriciousness of the sentences imposed in capital cases and suggesting that to prevent this capriciousness statutes must limit the distinction available to judges or juries when imposing sentences, the Court [in *Lockett*] . . . has now begun to complain of, in effect, the absence of discretion. As a result, we are likely to see more of what the Court calls 'capriciousness' ").

[4] For similar reasons, the eleventh circuit en banc court recently rejected an argument closely related to that advanced by Stanley:

> [In addition to ineffective assistance of counsel,] Washington also argues that [counsel's] failure to investigate and present character evidence rendered the imposition of the death penalty unconstitutional under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Lockett* the Supreme Court struck down a procedure which prevented the sentencer from considering aspects of the defendant's character and record as non-statutory mitigating factors. *Id.* at 604, 98 S.Ct. at 2964. As noted by the court in *Washington v. Watkins*, the Supreme Court cases on the death penalty deal with "procedural flaw[s] in the system of justice," not with alleged flaws in the judgment of counsel. 655 F.2d at 1356. Therefore, [counsel's] failure to investigate or present extensive character evidence does not render the imposition of the death penalty unconstitutional.

Washington v. Strickland, 693 F.2d at 1250 n. 12. We thus agree with the state habeas court's conclusion in the present case that "[*Lockett*] does not require that any particular kind of mitigating evidence be presented in order for the sentence of death to be constitutional." First state habeas hearing, *Stanley v. Zant*, No. 4186, slip op. at 3–4 (Super.Ct. of Butts County, Ga. March 6, 1981).

Our inquiry cannot end, however, with the determination that Stanley is wrong in asserting that failure to present any additional evidence at the penalty stage constitutes per se ineffective assistance of counsel. Stanley's attorney may still have been ineffective, under the circumstances of this case, in not presenting character evidence that he had the power to present under *Woodson*, *Lockett* and *Eddings*. This requires application of the general principles governing effectiveness of counsel to the specific context of a capital sentencing proceeding.

[5] The legal standard for judging effective assistance of counsel is easier to state than to apply. The black letter law in this circuit informs us that the counsel to which Stanley was entitled under the sixth amendment was a counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. *See, e.g., Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974). Stanley does not contend that his attorney was not "likely to render" effective assistance or that counsel suffered under a disability (such as conflict of interest) that subtly pervaded his entire conduct of the defense. Rather, Stanley asserts that counsel's actual performance was inadequate, that specific actions or omissions of his attorney rendered his representation ineffective.

[6] Stanley's burden, therefore, is to show that his counsel was not rendering reasonably effective assistance given the totality of the circumstances. *Washington v. Strickland*, 693 F.2d at 1250–51; *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); *Mays v. Balkcom*, 631 F.2d 48, 52 n. 1 (5th Cir.1980). Reference to the totality of circumstances implies that we look at counsel's overall performance rather than dissect his advocacy and second guess each individual action or inaction. The latter exercise would accomplish little, since a defendant is not guaranteed errorless counsel. "Our repeated assertions that a criminal defendant

is not entitled to error-free counsel are not mere rhetoric." *Washington v. Watkins*, 655 F.2d 1346, 1367 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The court in *Washington v. Strickland* acknowledged, however, that counsel's failure effectively to pursue an entire line of defense may in some circumstances transcend the individual error category and stamp his overall performance with the mark of ineffectiveness.

[7] To paraphrase Stanley's contention on appeal, the sentencing stage in a capital case is, in effect, a "trial," and counsel's failure to put forth a character evidence "defense" constituted ineffective representation. The core of Stanley's position is that the unique status of mitigation testimony in capital cases makes a failure to investigate or present such testimony when available a fundamental error rendering the overall performance ineffective. This is not because our standards of review of ineffectiveness claims are unusually strict in cases imposing the death penalty. Although the jurisprudence of this circuit has consistently recognized that "death is different" for a variety of reasons and in a number of contexts,[5] we have also applied the same legal principles governing ineffectiveness of counsel to capital and non-capital cases alike. But although the legal standards of effective representation may remain constant, "the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." *Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir.1982) (quoting *Washington v. Watkins*, 655 F.2d at 1357). *Accord Washington v. Strickland*, 693 F.2d at 1250 n. 12.

[8] The sentencing stage of any case, regardless of the potential punishment, is "the time at which for many defendants the most important services of the entire proceeding can be performed." ABA Standards on the Administration of Criminal Justice, Sentencing Alternatives and Procedures § 5.3(e). The special importance of the capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of the trial. This circuit has insisted that "effective counsel conduct a reasonable amount of pretrial investigation." *Washington v. Strickland*, 693 F.2d at 1251; *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir.1982) ("at the heart of effective representation is the independent duty to investigate and prepare"). While most of our ineffective assistance cases deal with the guilt phase and with material witnesses rather than character witnesses, *see, e.g., Goodwin v. Balkcom*, 684 F.2d at 810–14 (ineffectiveness found where attorney in capital case failed to interview damaging prosecution witnesses in addition to presenting no evidence at the sentencing phase); *Washington v. Watkins*, 655 F.2d at 1357–64, the doctrinal underpinnings of those cases apply equally to the sentencing phase of capital trials. This circuit has not before resolved the precise issue presented by Stanley.[6] In-

5. For an analysis of the jurisprudential reasons why "death is different," *see* Gillers, *supra* note 3, at 46–56. *See also* C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 30–36 (1974).

6. The panel opinion in *Washington v. Strickland*, 673 F.2d at 894, vacated when the en banc court voted to rehear the case, reached a result similar to that we reach today. By contrast, Judge Clark has argued that failure to present *any* available testimony at the sentencing hearing may constitute ineffectiveness. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1270–72 (11th Cir.1982) (Clark, concurring and

effective assistance cases in general, and cases turning on the need for character witnesses in particular, are extremely fact-specific. *See Goodwin v. Balkcom*, 684 F.2d at 805 ("[e]very case involving a constitutional claim of ineffective assistance of counsel turns on the facts and the conduct of those involved"). Prior cases, while providing some guidance, are thus of limited value. Still, it is notable that no panel of the eleventh or fifth circuits has to date found ineffective counsel predicated on failure to call character witnesses at the penalty stage of a capital case. In fact, the cases strongly suggest that such an ineffectiveness claim would be difficult to sustain even apart from the additional requisite showing of prejudice.

The en banc court in *Washington v. Strickland* rejected the contention that counsel in a capital case has an absolute

dissenting). Most of our cases have not reached the issue.

Proffitt v. Wainwright did not reach the precise issue presented by the present case. There are similarities, however: trial counsel in both presented no testimony at the sentencing stage, and both cases were decided prior to *Lockett* (*Lockett* was decided in 1978; Proffitt's trial was in 1974; Stanley's was in 1977, before *Lockett* but after the 1976 cases that were clear precursers of *Lockett*. *See* n. 2, *supra*), when "the law concerning capital sentencing was in a state of reformation." *Proffitt*, 685 F.2d at 1248. The court noted that the only Florida supreme court decision to have spoken on the issue in 1974 suggested that introduction of mitigating evidence was limited to the statutory mitigating circumstances. Thus, the court concluded that trial counsel's "belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in [the statute] was entirely reasonable." *Id.* By contrast, the Georgia statute in effect at the time of Stanley's trial specifically allowed the sentencer to give independent weight to any mitigating circumstance, even if not specifically listed in the statute. *See* Ga.Code Ann. § 17-10-30(b) (previously codified at § 27-2534.1(b) of the 1933 Code); *Gregg v. Georgia*, 428 U.S. 153, 163-64, 96 S.Ct. 2909, 2920-21, 49 L.Ed.2d 859 (1976). In fact, the jury possesses "an unlimited power to recommend mercy with or without reason." *Brawner v. State*, 221 Ga. 680, 685, 146 S.E.2d 737, 741, *cert. denied*, 385 U.S. 936, 87 S.Ct. 298, 17 L.Ed.2d 216 (1966); *see Collier v. State*, 244 Ga. 553, 261 S.E.2d 364, 376 (1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980); *Spivey v. State*, 241 Ga. 477, 246 S.E.2d 288, 291, *cert. denied*, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978); Ga.Code Ann. §§ 17-9-3 & 17-10-2; *see also Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936 (jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court).

Similarly, the court in *Spivey v. Zant*, 661 F.2d 464, 477 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982), did not reach an argument on appeal that counsel was ineffective because he offered no mitigating evidence at the penalty phase. Further, petitioner in *Washington v. Watkins*, 655 F.2d at 1357, asserted that counsel was ineffective in making no independent investigation into his character. The court concluded that Washington's counsel was not ineffective at the guilt phase, but the court concluded that resolution of other issues in the case rendered resolution of the sentencing issue unnecessary. *Id.* at 1366.

Petitioner in *Young v. Zant*, 677 F.2d 792 (11th Cir.1982), contended that his counsel was ineffective in refusing to offer evidence of his favorable background. The court found that the "favorable background might have prompted the jury to recommend mercy," *id.* at 797, but this was only a small part of an incompetency that pervaded virtually every aspect of the defense. Judge Fay concluded that Young had not been accorded "even a modicum of professional assistance at any time." *Id.* at 795. Similarly, counsel in *Kemp v. Leggett*, 635 F.2d 453 (5th Cir.1981), failed to call several character witnesses who were in court at petitioner's request. As in *Young*, however, that was only the tip of the iceberg. Counsel, whose previous criminal trial experience had consisted of assisting in one minor case, failed to interview the sole eyewitness to the crime or to discuss possible defenses with his client. The attorney admitted in an affidavit that he was not competent to handle a murder case. 635 F.2d at 454.

duty to investigate mitigating evidence even if counsel's trial strategy would not call for the use of the evidence. *Washington v. Strickland* involved a claim that trial counsel was ineffective because he did not investigate or present character witnesses or evidence of Washington's mental distress. Trial counsel had based his plea for mercy at sentencing on defendant's remorse and willingness to accept responsibility for his crime; his strategy was to introduce limited evidence of mental disturbance. Following a death sentence, Washington moved for postconviction relief on the basis of his counsel's failure to explore evidence in mitigation. Washington proffered fourteen affidavits from friends and relatives who stated they would have testified on Washington's behalf had they been requested to do so. Further, two psychiatrists were willing to submit reports stating that Washington was "chronically frustrated and depressed." Washington called his trial counsel as a witness in the federal habeas evidentiary hearing, and the en banc court focused on counsel's explanation of his trial strategy:

> The role of strategy in the calculus of reasonableness is of particular importance to this case. [Counsel] testified that he made a strategic choice to introduce limited character evidence during the plea colloquy and thereafter to rely upon expressions of frankness, sincerity, and remorse to persuade the judge to impose a sentence of life imprisonment. In light of that strategy, [counsel] would have viewed as unnecessary an extensive investigation into Washington's character. The district court did not evaluate the credibility of [counsel's] testimony or the reasonableness of his strategy in light of available alternatives. Rather, the court concluded that [counsel] was obliged to conduct an extensive investigation of Washington's character irrespective of whether his trial strategy would benefit from such investigation . . . .

Washington v. Strickland, 693 F.2d at 1251.

The en banc court declined to impose a constitutional requirement that counsel perform a substantial investigation into every plausible line of defense.[7] The choice by counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is still a strategic choice, although that choice would not receive the degree of judicial deference accorded to strategic choices made following a full investigation:

> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of de-

7. If given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might have cheerfully logged in many hours looking for the legal equivalent of a needle in a haystack. As already noted, a millionaire might have retained counsel to leave not a single stone unturned. However, a defendant is not entitled to perfection but to basic fairness. In the real world, expenditure of time and effort is dependent on a reasonable indication of materiality.
United States v. Decoster, 624 F.2d 196, 211 (D.C.Cir.1976) (footnote omitted). *See Washington v. Watkins*, 655 F.2d at 1356.

fense that he has chosen not to employ at trial.

Id. at 1255 (footnote omitted).

In sum, an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable.

Id. at 1256 (footnote omitted).

[9] The scope of counsel's duty to investigate character evidence in capital cases cannot be separated from the rule, articulated above, that counsel is not required under *Woodson*, *Lockett* and *Eddings* to present to the jury any arguably mitigating character evidence that might exist. In many cases, counsel could reasonably conclude that such evidence would be of little persuasive value or that it would cause more harm than good by opening the door for harmful cross-examination or rebuttal evidence. *See, e.g., Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir.1980) ("[w]hile counsel failed to interview and subpoena certain witnesses, this constituted trial strategy since to do so would have opened the door to introduction of Easter's prior conviction"). Having conducted a sufficient investigation, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.

This analysis finds support in the only two fifth circuit cases that have discussed the issue of counsel's duty to investigate or present character evidence in capital cases. In *Williams v. Maggio*, 679 F.2d 381 (5th Cir.1982) (en banc), petitioner contended that his trial counsel was ineffective for failing to conduct an adequate investigation arguing that, with proper pretrial investigation, counsel would have discovered many good character witnesses and then would possibly have decided not to have petitioner's mother testify but would have depended on favorable testimony from members of the community. This challenge to counsel's performance attempts to do precisely that which is barred by this Court; it invites us to question counsel's trial strategy and judge his performance incompetent if it was not errorless. We decline to take this action. There is little doubt that had trial counsel employed the trial strategy proposed by petitioner, this Court would now face an effectiveness of counsel argument based thereon. Trial counsel in this case made the best of a bad case.

Id. at 393. Petitioner also contended that his counsel had not prepared properly for the sentencing hearing since he failed to interview six readily available character witnesses in mitigation. Affidavits from those witnesses concluded that "drugs or bad influences" had brought about the criminal conduct. Three of these witnesses testified at the guilt-innocence stage about Williams' drug use. The en banc court, including the dissenters, agreed that the affidavits revealed that the witnesses would not have added any new evidence to that which had already been presented at the sentencing hearing by petitioner's mother. *Id.* at 392, 409. The court concluded that what "petitioner's present counsel is really objecting to is the trial strategy employed by trial counsel. We do not elect to second guess the trial strategy decisions of competent counsel." *Id.* at 392.

Similarly, in *Gray v. Lucas*, 677 F.2d 1086 (5th Cir.1982), Gray asserted that his trial counsel failed to render effective assistance by not fully investigating the use of character witnesses. Gray contended on appeal

that a more substantial investigation would have revealed certain witnesses who could have testified that he had a satisfactory prison record and others who would have testified that he had become "very spiritual and exhibited a 'caring, sharing type of interest in other people.'" *Id.* at 1092. The court found, however, that even though "Gray steadfastly maintained that he did not want character witnesses, [counsel] explored the possibility of having family members testify. This proved unsuccessful, however, since Gray's mother believed that her son should be executed and his brother was unable to come to Mississippi for the trial." *Id.* at 1091. Counsel also spoke with Gray's parole officer and with a police officer who had befriended Gray. The court stated:

> Gray purports not to challenge [counsel's] choice of trial strategy. However, some of his arguments are in fact directed solely at their decision to rely on a mentally disturbed defense rather than testimony on Gray's good character.... In the case at bar, [counsel] could have reasonably decided that testimony on Gray's good character would not be persuasive to a jury aware of the nature of his crime. Moreover, their decision that good character testimony would be inconsistent with a mentally disturbed defense is perfectly reasonable. Although these two types of testimony need not be inconsistent, [counsel] could have reasonably determined that in this case a local jury would perceive them to be inconsistent. In short, counsel's tactical decision did not constitute ineffective assistance.

Id. at 1094.

The attorneys in both *Williams* and *Gray* had conducted constitutionally sufficient investigations into the possibility of mitigation. The courts in both cases were thus understandably reluctant to second-guess the attorneys' tactical decisions. This is no more than a specific application of the general principle that when an attorney makes an informed choice between alternatives, his tactical judgment will almost never be overturned on habeas corpus.

[10, 11] On the other hand, a showing that counsel's decision to forego evidence was *not* based on a reasoned tactical judgment will give rise to an ineffective assistance claim. This is as true of character evidence as it is of any other sort of evidence. Were trial counsel for a capital defendant to testify that he had no strategy whatever for the sentencing phase and that he failed to consider or develop possible mitigating evidence, then such counsel must be deemed ineffective. *See Washington v. Strickland*, 693 F.2d at 1257 (the presumption of attorney competence could be rebutted "when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic"); *Kemp v. Leggett*, 635 F.2d 453, 454 (5th Cir.1981) (ineffectiveness found when trial counsel submitted affidavit admitting he was not competent to try a murder case). Similarly, such a claim can be made out, even if trial counsel does not testify, where the circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy.

[12] The record in the present case suggests that Stanley's counsel did in fact contemplate the possibility of a character witness defense at the sentencing stage and that he explored that possibility. While we do not know the extent of this inquiry, the transcript of the state habeas hearing confirmed that the attorney discussed the matter at least with Stanley and with Stanley's

mother. We need not determine, however, whether such an investigation satisfies the stringent requirements of *Washington v. Strickland*. Even if we assume that counsel failed to conduct the requisite investigation into mitigating evidence, Stanley's claim of constitutionally ineffective assistance must ultimately fail. We noted in *Washington v. Strickland* that "an attorney who makes a strategic choice to channel his investigation into fewer than all possible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable." 693 F.2d at 1256. An attorney may proceed absent a reasonable investigation into all potential lines of defense, but he does so at his peril. In Stanley's case, an investigation into character evidence would have revealed nothing more than general affirmations from family members and friends that Stanley had been, at a time remote from the events giving rise to the charge, a basically good and responsible child and young adult.

In his state habeas proceeding, Stanley produced the testimony of five members of his family and a family friend to the effect that if called they would have testified that he had never been in trouble, was obedient, helpful and cooperative and was not violent. His mother stated that he had difficulty in school and indicated that he was a slow learner. All of the witnesses would have been available to testify at Stanley's trial.

The pieces of evidence adduced from the witnesses at the state habeas hearing fall into one of two categories. First, there was some evidence that Stanley had a learning disability. Stanley's mother testified that her son was a slow learner and that he had been placed in an educably mentally retarded class in school. Such testimony would, however, merely repeat and corroborate material already produced. This evidence had been placed before the jury, in some detail, by various witnesses during the first phase of the trial.

Stanley's low intellectual capacity and reading ability were brought out during the testimony of E.W. Phillips, sheriff of Decatur County. Phillips read into the record the results of a psychological evaluation conducted on Stanley when he was fourteen years old. That evaluation had concluded that (1) Stanley had an IQ of 62 (counsel had previously informed the jury that "imbecile" was defined as a person with an IQ 0–65); (2) Stanley's test scores "suggest[ed] a history of culture deprivation .... The test results and observation indicated Ivon was an educatable mentally retarded youngster"; (3) it was "therefore recommended that he be placed in the exceptional child class designed for educatably mentally retarded youngsters as soon as possible to avoid any further continuation of the failure experience that he has undoubtedly incurred throughout his school history."

Similarly, Dr. Carl Smith, psychologist at the Georgia Central State Hospital, testified for the state as to Stanley's mentality, psychiatric makeup and other facets of his examination of Stanley. Smith testified that his examination revealed that Stanley had an IQ of 81 which he defined as not "too significant" in deciding whether "this particular man is mentally retarded." He did concede during an extensive and sophisticated cross-examination by Stanley's trial attorney that Stanley's IQ placed him in "the upper range of borderline mental retardation." Thus, it is evident that Stanley's mother would have added little by testifying that her son had been placed in a special class at school.

The second type of evidence presented at the state habeas hearing was testimony of Stanley's human qualities and his personal history. It is this sort of humanizing character evidence that Stanley contends is necessary for the constitutional imposition of death under the individualized sentencing requirements of *Woodson*, *Lockett* and *Eddings*.

Five character witnesses testified at the state hearing. Almost without exception these witnesses' testimony consisted of simple "yes" or "no" responses to counsels' questions concerning Stanley's character.[8] Stanley's mother, Mrs. Evelyn Stanley, testified that Stanley had never been in any kind of trouble before or been arrested before. His mother told the court that she, her other son and an assistant pastor from Stanley's church were present at the trial and prepared to testify; the assistant pastor had come for that purpose. She further testified that Stanley's counsel had discussed the matter of character witnesses with her, but that the issue had been dropped.

Two of Stanley's second cousins testified. Mrs. Linda Thompson, a high school teacher in Atlanta, observed that she had known him all his life, although she only saw him twice or three times a year. She testified that Stanley was a "very likeable person. Jovial. Obedient. Willing to cooperate with the family." He was "a very altruistic person. He wasn't self centered. He loved his family and cared about them quite a bit . . . ." She also stated that Stanley had never before been in trouble with the law. Another second cousin testified that Stanley was fun loving, very obedient, very nice, had never been in trouble, and had a promising life ahead of him.

Stanley's grandmother testified that she saw her grandson almost every weekend while he was growing up. She informed the judge that Stanley had been a loving son and grandson and that he had never been in trouble before. She noted that although she had met Stanley's lawyer prior to trial, he had never asked her about the kind of a person Ivon was. Finally, she testified that she had been unable to come to the trial because of employment pressures.

Stanley's younger brother testified that he knew his brother to be pacific, helpful and cooperative. He also stated that he had been present at his brother's trial, had met Stanley's attorney, that the lawyer never said anything to him about testifying for his brother, either before or after the jury came in with a finding of guilt.

A friend of the family testified that she had known Stanley for nine years and saw

Q Was he helpful around the house?
A Yes.
Q Did you ever see him engage in any fights or any kind of violence?
A No, sir.
Q Did he ever steal as a child?
A No.
Q Did he ever hurt anyone as a child?
A No.

Q Did Ivon go to church?
A Yes.

8. An example is this excerpt from the testimony of Stanley's mother:

Q Did he ever get into any kind of trouble?
A No. This is the first time.
Q Was he obedient?
A Yes.
Q Had he ever been arrested?
A No.
Q Had he ever been in any trouble with the police?
A No.
Q Was he ever a problem in school?
A No.

him frequently. He often played with her sons, who were his age, and he was nonviolent.

Stanley himself testified at the habeas hearing on his own behalf. He stated that his lawyer had once asked him about people who could testify about his character, that he had given the lawyer names of some people, but it never came up again. Stanley also introduced into evidence a letter from the pastor of his church which noted his good character, as well as a high school report which indicated that his character was thought to be excellent in every respect. Finally, he produced the letter that his mother had read into evidence during the penalty phase of the trial.[9]

We cannot say that this evidence would have had no impact on the jury, nor can we say that a tactical decision to use such evidence would have been unreasonable. It may be that often the best strategy in a capital case is to attempt to humanize the defendant by presenting evidence of his personal qualities. We are unable to hold, however, that any other strategy would be so unreasonable as to constitute ineffective assistance of counsel.

In the present case, counsel's failure to present character evidence at the mitigation phase did not deprive Stanley of his right to reasonable representation. Further, the record is silent as to counsel's perception of the strategic posture of the case. Neither party saw fit to call Stanley's trial counsel as a witness at the state habeas hearing. We thus do not know what his trial strategy was; we do not know why he elected not to pursue the character witness line of inquiry, which he initiated in conferences with both Stanley and his mother well in advance of the trial. The absence of any evidence of counsel's strategy places this case in stark contrast to cases such as *Washington v. Strickland*. We decline to infer from such silence an absence of strategy. When we know nothing of counsel's strategy, when the evidence not presented consists of general statements by family members that the defendant was, at a point in time remote from the events in question, a "good boy" and when such evidence is cumulative of evidence presented during the guilt phase of the trial, then the "ineffectiveness" prong of *Washington v. Strickland* has not been satisfied.

9. At trial, Stanley's mother's testimony was limited to reading the letter from her son into evidence:

THE WITNESS:

It says, "Dear Mother, I just sending a letter to let you know I am going to hope," I think it is—I don't know whether it is—it is R-O-O-K, room, that is room, July 6, 1976. "Hay Mother, I having"—let me see. "Hay Momma, I have seen the lawyer, mother, and he say this carries the chair and, mother, I don't know—don't know, what to go to—what now, I don't know what to do now about it, Momma, I didn't murder no one and rob no one and kidnap no one. To mother, and mother, I not lying to you. God knows it, but no one believes me, Momma. I don't know what to do. I don't know, I want—want to go to no chair for nothing I didn't do. Tell me what to do, say, hay Momma, are you coming to see me when I go, Momma, hay, Momma, you have told me, told us to be good and you will, we won't have to go to jail. I been good," I think way, he got this W. A. Y., it say, "Momma." It is the same thing he got down there, W. A. Y.

No, it says, "Momma, don't worry. I sorry, Momma, I didn't do it, believe me, and Mary, and Cat, you good to Momma and Senator, too, be a sweet baby for me, Cat, Sheriff, pray for me, I didn't do it because no one believes me, Momma."

"I want to come home and, Momma, he told them I robbed him and I—won't make them believe it. I didn't do it. Tell me what to do."

"Hay, tell T.C. to come and see I go to Court and tell him I say hay and come, too."

[13] This is not to suggest that trial counsel's testimony about his strategy is a necessary condition of an ineffective assistance claim. If counsel's conduct is so egregious as to raise an inference that it could not reasonably be part of any legitimate strategy, see, e.g., *Nero v. Blackburn*, 597 F.2d 991 (5th Cir.1979), then counsel's testimony would not be necessary. But Stanley's is not a case in which it is difficult to visualize a plausible trial strategy to explain the actions of his attorney. Under Georgia law, the sentencing jury may consider evidence placed before it during both phases of the trial. *See* Ga.Code Ann. § 17-10-30(b) (formerly codified at § 27-2534.1(b) of the 1933 Code). Thus, while Stanley's trial counsel elected not to offer additional evidence during the sentencing phase, we agree with the state habeas court that "it is incorrect to say that counsel offered no mitigating evidence" at all. The record belies the assertion that trial counsel made no effort to place before the jury information that might have tended to mitigate the jury's view of what his punishment should be.

[14] The character testimony of the state habeas witnesses was problematical,[10] and the state habeas court was correct in finding that the "testimony of these witnesses, mostly relatives, related to fairly obvious assertions of familial-type affection and loyalty which may well have no effect, or no good effect, on the jury." While character witnesses may make a critical difference, especially in a capital case, their utility in any given case is very much a matter of judgment and trial tactics.

Further, mitigation may be in the eye of the beholder.[11] Stanley's mother testified at the state habeas hearing, for example, that her son went to church. This evidence might be deemed mitigating, but it also could well have been perceived by the jury as being aggravating: if Stanley went to church, then he should have known the extreme culpability of his conduct. It is questionable, therefore, whether the evidence asserted by Stanley to be "mitigating" would have been perceived by the jury as such.

None of this is very precise, but that, in fact, is the point of our reluctance to second guess trial counsel's strategy. Effective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In other cases he may consider it unlikely to make much difference. In certain cases he may

10. It was also arguably redundant. Stanley testified during the guilt phase of the trial, giving his age, some of his background, employment and information about his family. Further, Stanley's mother read into evidence the letter from her son quoted in note 9, *supra*. (That was the extent of her testimony at the trial.)

11. *See, e.g., Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981). The panel majority found that Washington's steady domestic relationship and his role as a father might have been deemed mitigating factors. *Id.* at 1375-76. Judge Coleman disagreed contending that "there was no mitigation in what the majority chooses to assert 'might have been' mitigating." *Id.* at 1379 (Coleman, J., dissenting) (capitalization altered). Judge Coleman went on to explain:

> Neither society nor Mississippi law has ever favored the procreation of illegitimate children by self-indulgent fathers.
>
> All this being so, I simply cannot understand how the majority holds that violating the law by living together in an illegal relationship and fathering an illegitimate daughter "might be" a mitigating factor in a coldly planned robbery wherein the defendant chose to shoot the victim's entrails out and then coolly reloaded his shotgun as if he had done no more than kill a rabbit.

Id.

conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that .e considers more promising. His position in reaching these conclusions is strikingly more advantageous than that of federal habeas court in speculating ast hoc about his conclusions. His knov .dge of local attitudes, his evaluation of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of defendant, his familiarity with the reactions of the trial judge under various circumstances, his evaluation of the particular jury, his sense of the "chemistry" of the courtroom are just a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.

Representation of a capital defendant calls for a variety of skills. Some involve technical proficiency connected with the science of law. Other demands relate to the art of advocacy. The proper exercise of judgment with respect to the tactical and strategic choices that must be made in the conduct of a defense cannot be neatly plotted in advance by appellate courts.[12]

There may well have been sound considerations which dictated that counsel pursue the path that he elected. He may have felt that he had placed before the jury enough of the usable mitigation information and that a parade of family and friends—testimony available to most capital defendants—would do no good, and, indeed would detract from the force of the argument which he intended to make. Whatever his reason, or lack thereof, it was not presented to the habeas court. In such situations "[c]ourts presume, in accordance with the general presumption of attorney competence, that counsel's actions are strategic." *Washington v. Strickland*, 693 F.2d at 1257. In the absence of any evidence to overcome the presumption, no constitutional error is shown.

(2)

Stanley asserts that the aggravating circumstance set out in Ga.Code Ann. § 17-10-30(b)(7), upon which his death sentence was at least partially based, was applied in an impermissibly vague, overbroad and ambiguous manner in violation of rights protected by the eighth and fourteenth amendments. Specifically, he challenges the trial court's instruction on section (b)(7).[13] Stanley contends that *Godfrey* requires the trial court to instruct the jury of the limiting construction which the Georgia Supreme Court has placed on section (b)(7).

We do not read *Godfrey* as holding that a limiting instruction is required. The inquiry in *Godfrey* focused on whether the

12. The third circuit put it this way:

> The artistry of the advocate is difficult to judge retrospectively because the elements influencing judgment usually cannot be captured on the record. The kaleidoscopic range of possibilities often seem limitless, and it is proverbial that the finest ideas emerge on the way back from the courthouse. The advocate's work, therefore, is not readily capable of later audit like a bookkeeper's.

Moore v. United States, 432 F.2d 730, 736-37 (3d Cir.1970) (en banc).

13. Stanley did not object at trial and therefore under Georgia law he waived any claim of error. *Jones v. State*, 249 Ga. 605, 293 S.E.2d 708, 714 (1982); *Cunningham v. State*, 248 Ga. 558, 284 S.E.2d 390, 396 (1981), cert. denied, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *Gilreath v. State*, 247 Ga. 814, 279 S.E.2d 650, 670 (1981). We address the issue solely because the state habeas court ruled on its merits.

evidence in that case satisfied the criteria previously established by the Georgia Supreme Court for application of section (b)(7). By stressing the factual setting that gave rise to the case, the Supreme Court in *Godfrey* was not required to resolve the issue of whether a limiting instruction of section (b)(7) is mandated by cases such as *Gregg* that stress the importance of channeling jury discretion in death cases or whether the Georgia Supreme Court's proportionality review of capital cases is alone sufficient to keep section (b)(7) within constitutional bounds.

If we assume without deciding that such an instruction is required, the record before us falls far short of supporting the grant of the writ. Justice Stewart's plurality opinion in *Godfrey* found the first phrase of section (b)(7) to lack restraining effect on the arbitrary and capricious infliction of the death penalty: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428–29, 100 S.Ct. at 1764–65. He analyzed Georgia law, derived from two opinions of the Georgia Supreme Court,[14] as follows:

> The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Id. at 431, 100 S.Ct. at 1766 (footnotes omitted). Using this standard he concluded that the Georgia Supreme Court had misapplied its own constitutional construction because the evidence that it found sufficient did not reveal a consciousness materially more depraved than that of any other murderer. His reference to the fact that Godfrey's victims were killed instantaneously noted the absence of any evidence of serious physical abuse before death.

The trial court's charge to the jury in *Godfrey* was stated in the disjunctive language of the statute, *i.e.*, that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind *or* an aggravated battery to the victim." (emphasis added). Use of the disjunctive authorized the jury to find depravity of mind even absent any serious physical abuse of the victim before death. The jury did not address the second phrase in its finding at all. It found merely that the offense was outrageously or wantonly vile, horrible and inhuman. 446 U.S. at 426, 100 S.Ct. at 1763. Concerning this part of the judge's instructions and the jury's response, Justice Stewart said in dicta, "These gave the jury no guidance concerning the meaning of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." *Id.* at 429, 100 S.Ct. at 1765.

14. *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637, *cert. denied*, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 251 (1977).

The instruction given Stanley's jury was significantly different. Section (b)(7) was stated in terms of the state's contention: that the offenses were "outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim." (emphasis added). The jury reported finding beyond a reasonable doubt in the same language: "the offense involved depravity of mind and torture to the victim" (emphasis added).

The vice to which Justice Stewart pointed is simply absent. Under their instructions Stanley's jury could not fix punishment at death unless they found beyond a reasonable doubt that his depravity of mind resulted in torture to his victim. *Godfrey*'s jury was free to fix punishment at death even in the absence of any abuse of his victim before death and, indeed, they did so.

Arguably the undefined word "torture" still falls short of meeting the test because in a given case a jury might understand it to mean mental torture rather than a word to be read *in pari materia* with "aggravated battery" to require evidence of serious physical abuse. Stanley, however, is in no position to contend for a limitation of the word "torture" in his case. No contention is made that the torture to which his victim was subjected was anything other than physical. The evidence disclosed that in fact it was the most extreme type of physical abuse aptly characterized by the Supreme Court of Georgia: "Although the sheer savagery of Ivon Stanley's conduct may have been equalled by others, it has seldom if ever been exceeded." *Stanley v. State*, 241 S.E.2d at 180.

[15–17] Our habeas corpus review focuses on the role of the great writ as "a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, — U.S. —, —, 102 S.Ct. 1558, 1570, 71 L.Ed.2d 783 (1982). As a threshold for our intrusion into state criminal trials we look to see that petitioner has shown "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." *United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original). Stanley's claim of deficiencies in the section (b)(7) instruction provides insufficient justification for habeas relief in light of the evidence before us.

(3)

Stanley was arrested two days after the murder. He was advised of his rights and signed a waiver of counsel form. He was interviewed by an agent of the Georgia Bureau of Investigation but at that time denied any involvement.

Three days later Stanley was again interviewed. He had not then consulted a lawyer. He was again read his *Miranda* rights, allowed to read the rights from the form, acknowledged that he understood his rights and then signed the form. Stanley then gave a tape recorded statement in which he confessed to the details of the robbery and murder.

[18] Stanley argues that use of a "waiver of counsel" form does not satisfy the *Miranda* requirement that prisoners be meaningfully advised that they had a right to counsel—not just a right to waive counsel. The contents of the form and the tape recorded interview, however, make it absolutely clear that Stanley was advised fully and correctly of his rights and that he acknowledged that he understood separately

with respect to each provision. Stanley's criticism of the caption of the form finds no support in either *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), or *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), the authorities on which he purports to rely. The record strongly supports the district court's conclusion that Stanley "was thoroughly advised of his right to consult with an attorney before making any statement and that he understood his rights and was willing to make a statement freely and voluntarily." *Stanley v. Zant*, Civ. Action No. 80-66-THOM, slip op. at 3 (M.D.Ga. June 11, 1981).

(4)

[19] Stanley's final contention is grounded on his own testimony that he took no part in the killing and tried to discourage codefendant Thomas from killing the victim. Based on this version of the murder, he argues that imposition of the death penalty is unconstitutional because he possessed no purpose to cause the death of the victim.

Subsequent to oral argument the Supreme Court spoke to this subject area in *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where on eighth and fourteenth amendment grounds it reversed a death penalty that was based on a conviction for felony-murder. The Supreme Court examined the historical development of the death penalty for accomplice liability and concluded that our culture has rejected the imposition of the penalty upon persons who "neither took life, attempted to take life nor intended to take life." *Id.* 102 S.Ct. at 3371. The Supreme Court accepted the holding of the Florida Supreme Court that the record supported no more than an inference that Enmund was the driver of the getaway car, where he remained throughout the robbery and murder:

> the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the . . . money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery.

Id. 102 S.Ct. at 3371 (quoting *Enmund v. State*, 399 So.2d 1362, 1370 (Fla.1981)).

Stanley's level of personal culpability is greater than Enmund's by at least an order of magnitude. It was Stanley, himself, who was overheard long before the murder to say that after he and Thomas robbed the victim they would have to "get rid of him." His role was aptly described by the Supreme Court of Georgia as follows:

> [T]here was evidence showing that he was an active participant in the crimes: enticing the victim to the place of the robbery, handling the pistol, guarding the victim while Thomas moved the car, digging the victim's grave, and burying the victim while he was still alive and pleading for his life.

Stanley v. State, 241 S.E.2d at 180.

From our examination of the record we agree with the district court that "a trier of the fact could conclude beyond a reasonable doubt that the Defendant had a clear intention to kidnap, rob and murder the victim."

AFFIRMED.

FAY, Circuit Judge, concurring:

Bound by our court's recent opinion in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir.1982) (Unit B en banc), I concur. My personal views continue to be those expressed in the dissents of Judges Roney and Hill.

ARNOLD, Circuit Judge, Sitting by Designation, dissenting.

In the penalty phase of his capital trial, counsel for Ivon Ray Stanley introduced no evidence. We now know that relatives and friends of the defendant could have given testimony that would have portrayed Stanley as a "uniquely individual human being [ ]," *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), perhaps worthy of the compassion of at least one member of the jury. The Court concedes that it "cannot say that this evidence would have had no impact on the jury," *ante*, slip op. at 1492, at —— and that "[w]e . . . do not know what [counsel's] trial strategy was . . . ," *ibid.* Yet, the death penalty is upheld because Stanley did not, at the evidentiary hearing held by the state post-conviction court, prove that counsel's conduct was *not* the result of some reasonable trial strategy. Because I cannot agree with this allocation of the burden of proof, I respectfully dissent.

As an original matter, I should not have placed the burden of proof on Stanley to negative the possibility that his lawyer had made a tactical or strategic choice to present no evidence in mitigation. In general, the burden is and should be on anyone who seeks to overturn the judgment of a court having jurisdiction. And it is eminently fair to require a defendant who claims his lawyer was ineffective to come forward with specific complaints about what the lawyer failed to do, and with specific arguments about how this failure hurt his case. If the claim is, for example, that certain witnesses were not presented, the defendant should be required to show who they were and what they would have said if called to testify. That kind of evidence is readily accessible to the defendant, and probably to no one else, since defense witnesses in the penalty phase of a capital trial are likely to be family members, friends, or acquaintances. "Generally, the burden of proof is allocated to that party who has control of the evidence required to prove the claim raised in the action. In an action based on a claim of ineffective assistance of counsel due to a failure to produce evidence, this mitigating evidence is peculiarly within the control of the petitioner. Therefore, it is appropriate in such cases to allocate the burden of proof to the petitioner." *Washington v. Strickland*, p. 1274 n. 23 (5th Cir.1982) (Unit B en banc) (Tjoflat, J., concurring). To this extent, Stanley has met his burden, and I do not understand the Court to hold otherwise.

The question of trial counsel's strategy, or lack of it, is quite different. The lawyer himself is obviously the best witness on that subject, in many cases the only witness, but he is now in an adversary position vis-a-vis his former client. He may be unwilling to cooperate with present counsel. The very point of the proceeding is to challenge his professional conduct. He is much more likely to cooperate and consult with counsel for the State, whose object at the hearing will be to vindicate his conduct. It makes more sense, it seems to me, to put the burden of proof on the State, once a petitioner demonstrates some omission serious on its face, to call trial counsel as a witness to explain his or her reasons for what was done at the trial. "If in a given case the

petitioner does not have access to the information necessary to sustain his burden of proof, the district court is of course free to make appropriate adjustments in the allocation of the burden." *Washington v. Strickland, supra*, at 1261 n. 31. Here, the State did not call trial counsel as a witness; its brief in this Court does not suggest what counsel's strategy was; we do not know what it was; and no court, state or federal, has ever found that counsel's conduct was the result of a strategic decision. In this situation, if I were free to do so, I should hold that counsel was constitutionally ineffective and that petitioner should have a new trial. He would not be released from prison. There would simply be a new trial as to punishment, and the worst that could happen, from the point of view of the State, would be a sentence of life imprisonment.

Obviously my view of the proper allocation of the burden of proof is influenced in part by the fact that this is a death case. The more serious the consequences of a wrong decision, the more one wants to be careful to make the right one. That is what burden of proof is all about. Rules about presumptions and burdens of proof reflect one's views about where the risk of loss ought to be placed, and about what kinds of mistakes are more tolerable than others. Presumptions are not usually applied *in favorem mortis*. It is not a novel proposition that judgments inflicting the penalty of death should be hedged about with greater safeguards. The very existence of bifurcated trials in death cases proves that, if proof be needed. It may be true that the same legal principles govern ineffectiveness of counsel in capital as in non-capital cases; it is also true that the seriousness of the charges is a factor to be considered in assessing counsel's performance. *Ante*, slip op. at 1485 at ——.[1] It is not asking too much, when life is at stake, to require the State or counsel himself to explain a choice to present *no* evidence in mitigation. This is not a case, as I shall argue below, where counsel chose to present one line of testimony rather than another. Nor is it a case where a plausible strategic explanation readily suggests itself. "It is not enough," as the Supreme Court said in another capital case involving the right to counsel, "to *assume* that counsel . . . thought there was no defense and exercised [his] best judgment." *Powell v. Alabama*, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158 (1932) (emphasis supplied).

As I understand the en banc opinion in *Washington v. Strickland, supra*, however, it is the rule of this Circuit that if a lawyer fails to conduct a substantial investigation into one plausible line of defense, "[c]ourts presume, in accordance with the general presumption of attorney competence, that counsel's actions are strategic." *Id.* at 1257. It is, in general, up to the petitioning prisoner to rebut this presumption, by, for example, calling counsel as a witness to testify that his choice was not strategic. Sitting by designation as a judge of this Circuit, I am bound by that rule. Even so, there are at least three reasons why the presumption of strategic choice should not apply to the facts of this case.

First. This is not a case in which counsel discerned several plausible lines of defense and chose to make a substantial investigation of fewer than all of them. Here, counsel made no investigation whatever, so far

1. *Cf. Holtan v. Parratt*, 683 F.2d 1163, 1170 (8th Cir.1982) (counsel's ineffectiveness held prejudicial in a capital case in part "because of the dire consequences that would [otherwise] flow . . . .").

as I can tell, of mitigating evidence. To be sure, the jury is free to consider, in mitigation, evidence already before it on the question of guilt or innocence, and counsel might choose not to repeat that evidence. But here a good deal of what could have been presented in mitigation was not repetitious at all. Counsel discussed the possibility of character witnesses with petitioner and his mother, and Stanley gave him some names, but the subject never came up again, and counsel did not discuss possible mitigating testimony with any of the other witnesses who later testified at the state habeas hearing. The Court does not claim that this "investigation," if it can be called that, "satisfies the stringent requirements of *Washington v. Strickland*." *Ante*, slip op. at 1490, at ——. It seems to say, instead, that counsel could reasonably have chosen to pursue some other strategy. The difficulty with this reasoning is that counsel did not pursue any other line of defense. This is not a case, for example, of counsel's choosing to call witnesses as to diminished mental capacity, instead of character witnesses. Here no witnesses at all were called. If counsel's closing argument to the jury (of which more hereafter) is to be treated as a "strategy" or a "line of defense" that counsel chose in preference to character witnesses, it is still difficult to approve his choice as constitutionally effective lawyering. The closing argument, at best, was a simple plea for mercy, and character evidence would have helped that plea, not hurt it. There is nothing in the least inconsistent about calling character witnesses and then pleading for mercy. In short, this case should be governed by the Court's statement in *Washington*, at 1252–53, that "permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense."[2]

Second. As the Court notes in *Thomas*, the companion case, slip op. n. 14, Ga.Code § 38–801(d) (recodified at § 24–10–24, 1982) requires the tender of a witness fee of ten dollars and mileage of 20 cents a mile with the service of a subpoena for the attendance of a witness. Stanley was convicted in Decatur County, in the southwestern part of the State. He is in prison in Butts County, in central Georgia. State habeas must be brought in the county of incarceration, Ga.Code § 50–127 (recodified at § 9–14–43, 1982), and that is where Stanley's two state habeas petitions were filed. Stanley has no money, and indigent habeas petitioners have no right to financial assistance under Georgia law. *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461, *cert. denied*, 449 U.S. 1057, 101 S.Ct. 631, 66 L.Ed.2d 511 (1980); *Pulliam v. Balkcom*, 245 Ga. 99, 263 S.E.2d 123, *cert. denied*, 447 U.S. 927, 100 S.Ct. 3023, 65 L.Ed.2d 1121 (1980). Not even witness fees will be waived. *Neal v. Smith*, 226 Ga. 96, 98, 172 S.E.2d 684, 686 (1970) (Georgia laws do "not contemplate that the public shall bear the expense of bringing witnesses into court.").

2. The only material difference between this case and *Thomas v. Zant*, — F.2d ——, No. 81–7675, also being decided today, is that in *Thomas* petitioner proffered in the District Court an affidavit of trial counsel that she did not "investigate or interview witnesses for the penalty phase of [the] trial. I made no preparation or presentation of any mitigation circumstances." *Thomas v. Zant*, slip op. at 24. Very nearly the same thing can be said about Stanley's trial counsel. Yet, Thomas will live, for the time being at least, but Stanley, if this Court has the last word, will die. They committed the same crime. It is true in *Thomas*, as it is here, that "[t]he present record contains no direct evidence of why trial counsel was not called to testify at the state habeas proceeding." *Id.* at 25.

It is unjust for the State to deny petitioner the means to subpoena his trial counsel to testify at his state habeas hearing, and for the federal courts then to fault him for not showing, through the testimony of counsel, that counsel did not make a strategic choice. Surely this kind of disability, placed upon Stanley because of his poverty, should excuse his not meeting his burden of proof. He could have had witnesses subpoenaed at federal expense to testify before the federal habeas court, but the District Court declined to hold an evidentiary hearing. In *Thomas* an evidentiary hearing will be held on remand, and one of the points raised will presumably be that Thomas was not guilty of deliberately bypassing an available state procedure precisely because state law denied him the means of using that procedure. I would allow Stanley at least the same chance to establish an excuse for not meeting his burden of proof.

Third. The presumption that counsel's choice was a strategic one can be rebutted not only "when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic," but also "when certain of counsel's actions do not conform to a general pattern of a rational trial strategy." *Washington v. Strickland, supra*, at p. 1258. I think this record contains a substantial indication that the latter standard is met. In the course of his final address to the jury counsel said:

> I have done my duty. I'll walk out of this courtroom today feeling that I have even gone overboard against my friends, against those I sit in church with, against those I have sat in the lodge with, against those I have broken bread with.

We do not know what counsel hoped to accomplish by these remarks. Perhaps he meant to say, "I have done my duty. Now you, the jury, should do yours by being merciful." But the natural meaning of the words is quite different. They seem to be asking the jurors to forgive the lawyer, their fellow citizen, for taking the side of a criminal. They seem to be apologizing for the vigor of the defense counsel had offered. They raise the question whether counsel's decision to present no evidence in mitigation, far from being a strategic choice, was rather motivated by a desire not to offend church and lodge by going any further "overboard" in Stanley's cause. When a lawyer has a conflict of interest between two defendants, both of whom he is trying to represent, the conviction will be reversed without a showing of prejudice. See *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Here a conflict just as real seems to have existed in the lawyer's mind. He had "gone overboard" in the guilt-or-innocence phase of the trial, and chose to present no evidence in the punishment phase. Here, just as "in a case of joint representation of conflicting interests[,] the evil . . . is in what the advocate finds himself compelled to *refrain* from doing." *Holloway v. Arkansas, supra*, 435 U.S. at 490, 98 S.Ct. at 1181.

The implications of counsel's closing argument, it seems to me, are at least serious enough to neutralize any presumption that his decision to present no mitigating evidence was a reasonable strategic choice.

Perhaps my reconstruction of counsel's possible motivation is unfairly harsh. If so, an evidentiary hearing on remand could set the record straight. The Court suggests that counsel, if he had made an investigation of character witnesses, might have decided that they would do Stanley more harm than good. Certainly that is true in

the abstract. But there is very little concrete indication that character witnesses would have hurt Stanley's chances in this case. Some evidence will almost always be better than none. With all defereno the Court's reflections on Stanley's lawyer's possible mental processes are no more than speculation.

At the very least I would remand this case for an evidentiary hearing on why no evidence in mitigation was offered. I therefore respectfully dissent.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IVON RAY STANLEY,
Petitioner

v.

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,
Respondent

CIVIL ACTION NO. 80-66-THOM

Filed at 9:00 A. M
JUN 12 1981
J. Lundie Smith
Deputy Clerk, U.S. District Court

OPINION AND ORDER

Petitioner Stanley along with a co-defendant, Joseph Thomas, was convicted in the Superior Court of Decatur County, Georgia, in April, 1976, for the murder of Clifford Floyd. He was also convicted of kidnapping with bodily injury. Succinctly stated, the record shows that Stanley admitted robbing the victim at gunpoint and along with Thomas taking the victim to the woods where the victim was struck with a hammer, tied to a tree, made to lie in a shallow grave, beaten and jabbed with a shovel in the head, throat and chest, shot with a pistol and buried alive while he was pleading with Stanley and Thomas to stop. Petitioner's convictions and death sentences for murder and kidnapping with bodily injury were affirmed. See Stanley v. State, 240 Ga. 341 (1977), cert. den. 439 U. S. 882 (1978).

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, where he was denied relief and was denied a certificate of probable cause to appeal to the Supreme Court of Georgia. His petition for a writ of certiorari was denied by the United States Supreme Court in February, 1980. Stanley v. Zant, _____ U. S. _____ (1980)

[Case No. 79-5714]. The Petitioner then refiled a habeas corpus petition in the Butts Superior Court and thereafter filed the petition which is now before this Court.

In his state habeas corpus proceeding the first contention made by the Petitioner (and here repeated) was that he was denied the effective assistance of trial counsel, primarily because of a alleged failure of the trial attorney to investigate and secure witnesses to testify on mitigating evidence during the punishment phase of trial.

Petitioner has not shown his trial attorney to have been ineffective. If his contention is that the trial attorney failed to provide evidence in mitigation, that contention is unfounded and is belied by the record and the findings of the state habeas court. What Petitioner is doing is simply reviewing his trial several years later and in hindsight attempting to show that his trial attorney was ineffective for not placing before the jury evidence which would have been redundant in nature. Indeed, it is quite questionable whether the evidence asserted by the Petitioner as "mitigating" would have been viewed by the jury as such. In any event, the conduct of the trial by Petitioner's trial attorney was certainly reasonable effective assistance of counsel. Petitioner was given a full and fair opportunity to develop this issue in the state habeas corpus proceedings and was unable to establish his contention. The state habeas corpus court has properly ruled on this issue and this Court, applying federal legal standards to the facts so developed, concludes that this issue is without merit.

The next contention made by the Petitioner is that his confession was inadmissible in evidence during the trial because he contends that the confession was given without consultation with counsel. This issue was addressed in detail by the Supreme Court of Georgia. The record shows that the Petitioner was thoroughly advised of his right to consult with an attorney before making any statement and that he understood his rights and was willing to make a statement freely and voluntarily. The entire sequence of events was considered by the Supreme Court of Georgia in addressing this issue and that court concluded, as we do, that the contention is without merit.

The next issue presented in this petition alleges that the Petitioner's death sentence was based at least in part upon an unconstitutional application of Georgia Code Annotated, §27-2534.1(b)(7) contrary to the admonitions of the United States Supreme Court in Godfrey v. Georgia, _____ U. S. _____, 100 S.Ct. 1759 (1980). The record in this case shows that the jury was instructed on the statutory aggravating circumstances and that those circumstances were supported by the evidence and that the jury was correctly instructed by the trial court and that the determination made by the jury was justified. Under the facts of this case as shown by the transcript of the evidence it is clear that the offenses for which the Petitioner was convicted "were outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim". The state habeas corpus court concluded that this contention was without merit and this Court agrees with that conclusion.

In his next enumeration the Petitioner contends that imposition of the death penalty is unconstitutional in his case because he had no "purpose" to cause the death of the victim. The issue here raised by the Petitioner is in effect one of his intent and a review of the evidence in this case clearly shows that the jury was authorized to find the Defendant's intent. Stated otherwise, a trier of the fact could conclude beyond a reasonable doubt that the Defendant had a clear intention to kidnap, rob and murder the victim, and the death penalty in the circumstances here presented would not be precluded.

The next contention made by the Petitioner is that the prosecuting attorney made improper argument to the jury during the sentence phase of the trial. It is noted that no objection was made at the time of trial to the prosecuting attorney's argument. The question was raised for the first time on appeal. The Supreme Court of Georgia gave consideration to this contentic and concluded that the closing argument of the District Attorney did not provide any basis for reversal of his conviction, that Court concluding that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor and this Court likewise concludes that this contention made by the Petitioner provides no basis for the granting of federal habeas corpus relief.

The next contention here made by the Petitioner is that the imposition and execution of a death sentence under the applicable Georgia statute violates certain pertinent provisions of the United States Constitution because Petitioner alleges that

the death penalty is administered arbitrarily, capriciously and whimsically in the State of Georgia. The Supreme Court of Georgi has in a number of cases decided that this contention is unfounded and this Court agrees with that conclusion.

The last contention made by the Petitioner is that the imposition of the death sentence in his case violates certain other provisions of the Constitution of the United States and of the Constitution of the State of Georgia because he alleges the Georgia statutory provisions and practices governing appellate review of death sentences deny the Petitioner the effective assistance of counsel and a fair hearing. The Supreme Court of Georgia has in a number of cases determined that the Georgia procedures referred to are not subject to such constitutional attack and this Court agrees with that conclusion.

The Court notes that the Petitioner presents some other contentions in the habeas petition filed in this Court which are not properly before this Court because they were not urged by the Petitioner before the courts of the State of Georgia, but even if they were properly before this Court for consideration, the record indicates that they are without merit.

In summary, this Court determines that the Petitioner has had a full and fair opportunity to present any issue which he desired to present to the courts of the State of Georgia and that he was given ample opportunity to present evidence and did in fact present evidence with regard to any issue asserted and that the contentions made by the Petitioner were addressed fully by the state courts and under the standards set forth in 28 U.S.C. §2254(d) the findings of fact thus made by the state court after

a full and fair hearing on the merits should by this Court be presumed to be correct, the state court proceedings not falling within any statutory exceptions which would rebut such presumption of credibility. The findings of fact made by the state court are fully supported by the evidence developed at the hearing. This Court, therefore, accepts the findings of fact contained in the state court's order, applies federal legal standards to those factual determinations, and concludes that the Petitioner is not entitled to a federal evidentiary hearing and that such a hearing would not benefit this Court in addressing the Petitioner's allegations.

Consistent with the foregoing, the relief sought by the Petitioner is denied and it is directed that the petition be dismissed and the Petitioner is remanded to the custody of the Respondent so that the sentence heretofore imposed by the state court may be carried out according to law.

IT IS SO ORDERED this 11th day of June, 1981.

/s/ Robert Elliott

UNITED STATES DISTRICT JUDGE

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

IVON RAY STANLEY,	:	
PETITIONER	:	HABEAS CORPUS
VS.	:	FILE NO. 4836
WALTER ZANT, WARDEN GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
RESPONDENT	:	

O R D E R

This habeas petition contains 79 paragraphs, 64 of which set forth substantive claims for relief. The Petitioner litigated a habeas corpus case in this Court in H.C. No. 4186, Butts Superior Court, in which relief was denied on July 26, 1979. Certificate of Probable Cause was denied by the Georgia Supreme Court on September 6, 1979. Certiorari was denied by the United States Supreme Court in February, 1980.

The Court has examined the Petition and finds no grounds for relief which could not reasonably have been raised in the original petition with one exception. Accordingly, all grounds are deemed waived and the petition successive except as to paragraphs 19 and 20.

Paragraphs 19 and 20 raise a Godfrey[1] issue.

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[1] Godfrey v. Georgia, ___ U.S.___, 64 L.Ed.2d.398 (1980).

While this issue was raised in the Petition for Certiorari which was denied by the United States Supreme Court, this Court will address it. First, the death penalty for the Murder was based on Ga. Code §27-2534.1(b)(4) as well as (b)(7). Second, the evidence indicated that Petitioner and a co-defendant beat the victim, shot him in the head five times, and then buried him alive while he was still trying to talk to them. This justifies a finding that an aggravating battery was inflicted upon the victim and that he was tortured prior to his death. Godfrey, therefore, is not authority for the constitutional attack made on the sentence of death imposed for the murder.

The Court notes that Petitioner raises an ineffective assistance claim in paragraphs 12-17. Petitioner's counsel[2] in his first State habeas raised this claim but it was rejected by this Court (See Division I of Order in Stanley v. Zant, Habeas Corpus Case No. 4186, Butts Superior Court) and the Supreme Court of Georgia upon denial of a Certificate of Probable Cause. This ground not only could have been but was raised in the prior petition. To allow each habeas counsel to litigate the effectiveness of previous habeas counsel would make termination of the litigation impossible.

Therefore, the Court finds that all claims for relief in this Petition have either already been ruled on, have been waived, or are legally insufficient. No evidentiary hearing is needed

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[2] Not the counsel filing this Petition.

or required. The Petition is denied. The Application for Stay of Execution is denied.

So Ordered, this 14th day of October, 1980.

R. ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

SUPREME COURT OF GEORGIA

ATLANTA, September 6, 1979

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

IVON RAY STANLEY V. WALTER ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

IVON RAY STANLEY,	:	
	:	
PETITIONER	:	HABEAS CORPUS
	:	NO. 4186
VS.	:	
	:	
WALTER D. ZANT, WARDEN,	:	
	:	
RESPONDENT	:	

O R D E R

This Petition for Writ of Habeas Corpus seeks relief from a conviction and sentence of death imposed upon Petitioner by the Superior Court of Decatur County on January 15, 1977. The convictions for Murder and Kidnapping with Bodily Injury and the imposition of the death sentence as to each were affirmed by the Supreme Court of Georgia in Stanley v. State, 240 Ga. 341 (1977). A Petition for Certiorari was denied by the Supreme Court of the United States. Stanley v. Georgia, _____ U.S._____, 58 L.Ed.2d 194 (1978). This Habeas Corpus Petition was filed, amended, and hearing was held on March 28, 1979. The Petition, as amended, raises several issues on which no evidence was presented at the hearing and on which no argument has been made. Accordingly, the Court will discuss only the three points argued by Petitioner in his Brief. They are as follows:

1.

Petitioner claims that he was denied his

Sixth and Fourteenth Amendment rights to the effective assistance of counsel by the failure of his trial counsel to present any evidence during the sentencing phase of the trial. In support of this claim, Petitioner presented at the habeas hearing the testimony of several persons who would have been available to testify during the sentencing phase of the trial. Petitioner argues that this evidence could have made a difference in the determination of the jury as to the penalty to be imposed and that his trial counsel was ineffective for not putting up this evidence at the appropriate time.

These witnesses were Mrs. Evelyn Stanley, Petitioner's mother; Linda Thompson, Petitioner's second cousin; Eliza B. Yulee, Petitioner's grandmother; Eddie Mae Williams, a friend of Petitioner's family; Martha Louise Henley, Petitoner's second cousin; and, Jeff Stanley, Petitioner's brother.

The transcript of the trial indicates that Petitioner's trial counsel elected not to offer additional evidence during the sentencing phase of the trial. But it is incorrect to say that Petitioner's trial counsel introduced no mitigating evidence because the jury was authorized to consider all evidence placed before it during both phases of the trial. During the main trial, Petitioner's mother testified (Trial Transcript, Vol. II, pp. 450-453). The Petitioner testified during the main trial, giving his age, some of his background,

employment, and information about his family (Trial Transcript, Vol. II, pp. 453-455). Petitioner's low intellectual capacity and reading ability were before the jury, the same having been brought out on cross-examination of the Sheriff. (Trial Transcript, Vol. II, pp. 110-122). Further, the testimony of Dr. Smith concerns Petitioner's mentality, psychiatric makeup, and other facets of his examination of Petitioner. (Trial Transcript, Vol. II, pp. 150-164).

Accordingly, it cannot be said that trial counsel made no effort to place before the jury information that might have tended to mitigate the jury's view of what his punishment should be. In retrospect, it might be said, or at least argued, that there was nothing to be lost by calling the witnesses listed above who testified at the habeas hearing. But the testimony of these witnesses, mostly relatives, relates to fairly obvious assertions of familial-type affection and loyalty which might well have had no effect, or no good effect, on the jury.

Petitioner argues that Lockett v. Ohio, _____U.S._____, 57 L.Ed.2d 973 (1978) requires that mitigating evidence be heard by a sentencing jury. But Lockett stands for the proposition that the Constitution requires that no mitigating evidence be excluded from consideration by the jury. It does not require that any particular kind of

mitigating evidence be presented in order for the sentence of death to be constitutional.

The standard for effective assistance which has been recently used by Georgia Courts is that of whether counsel is capable of and is in fact rendering reasonably effective assistance of counsel. The Court finds nothing in the transcript of Petitioner's trial or anything in the habeas proceeding which leads to the conclusion that Petitioner's counsel rendered less than reasonably effective assistance. Accordingly, this aspect of the habeas petition is without merit.

2.

Petitioner claims that his rights under the Eighth and Fourteenth Amendments have been violated by the imposition of the death penalty in a case where, according to Petitioner, there was no purpose to cause the death of the victim. Petitioner argues that, because he was convicted of felony-murder and because his story was that he tried to discourage his companion from killing the victim, the imposition of the death penalty is unconstitutional.

Regardless of whether this argument is well grounded factually, Petitioner has directed the Court to no legal authority for the position urged. Lockett v. Ohio, supra, which is cited by Petitioner, does not support Petitioner's position in this regard; to the contrary, the majority in Lockett did not even address the issue concerning whether the Defendant

had a purpose to cause the death of the victim. Because the Defendant in Lockett was indicted for murder on a theory consistent with the felony murder theory of Petitioner's case and the Supreme Court failed to focus on this as an issue, Lockett supports by inference the proposition that the death penalty can be imposed for felony murder.

The Supreme Court of Georgia, in Stanley v. State, supra, examined the evidence against Petitioner and found that he was an active participant. The Court concluded that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases and that the imposition of the death sentence was consitutional within the guidelines in Gregg v. Georgia, 428 U.S. 153 (1976), and its progeny. (Cf. Hall v. State, 241 Ga. 252 (1978), in which the defendant's death sentence for felony murder was reversed as disproportionate in light of his lack of participation, and a failure to assess a death sentence against his companion "trigger-man.")

3.

Petitioner claims that his constitutional right to a fair trial was violated when the Court failed to grant his Motion for Change of Venue. Further, Petitioner asserts that his counsel was ineffective for failing to insist on a written ruling on this Motion.

In order to prevail on this ground, Petitioner would have to show that the jurors summoned to try his case had been so influenced by pre-trial publicity

that they had formed fixed opinions as to his guilt or innocence. Krist v. Caldwell, 230 Ga. 536 (1973); Young v. State, 239 Ga. 53, 56-57 (1977). Jurors summoned for the trial of Petitioner's case were asked questions concerning pre-trial publicity and whether they could perform the function of being a fair and impartial juror, and there is no indication that any juror had been adversely affected. (See Trial Transcript, Vol. I, p. 50). Petitioner now asks the Court to assume that the jurors had been adversely affected without any evidence to support what amounts to no more than mere supposition.

This claim of Petitioner presents no issue on which any relief can be granted to him.

To the extent that any other issues raised in the Petition have been covered by the evidence or argument, they are found to be without merit.

Accordingly, the Petition for Writ of Habeas Corpus is denied.

This 26th day of July, 1979.

R. ALEX CRUMBLEY, JUDGE SUPERIOR COURTS, FLINT JUDICIAL CIRCUIT

In the Supreme Court of Georgia la.

f. 10 Decided: NOV 28 1977

32260. STANLEY v. THE STATE

HILL, Justice.

This is a death case. The defendant was convicted by a jury of felony murder (during commission of an armed robbery), armed robbery, and kidnapping with bodily injury. The jury found that each of these crimes was committed while the defendant was engaged in the commission of the other capital offenses, and that each was outrageously and wantonly vile, horrible and inhuman in that the offense involved depravity of mind of the defendant and torture to the victim. The jury also found that the murder was committed by the defendant for himself for the purpose of receiving money and other things of value. For each of the three convictions the jury fixed punishment at death by electrocution.

Several weeks before the crime, two witnesses on separate occasions had heard discussions between the defendant and Joseph Thomas, who was indicted with the defendant. The two were discussing "hitting" an insurance agent who routinely followed a collection route through the small community in which the defendant lived. One of the witnesses overheard the defendant remark that after the robbery they would have to "get rid of him."

In a taped statement played to the jury the defendant said that on the day of the crimes he agreed with Thomas to "get" the insurance man for his money. The defendant stated that later that day, after the victim had made some collections in the area, and as the victim went behind a trailer, he (the defendant) pointed a gun at the victim. A witness saw the defendant pointing at the victim. The victim was forced to turn over his money, which the collection records indicated to be about $220. The defendant testified at trial that the three then went into some nearby woods and that on the way Thomas struck the victim on the arm with a hammer. After pleading for his life, the victim was hit on the head with the hammer and fell to the ground. The victim was then tied to a tree, and Thomas left the woods to move the victim's car. A witness testified to seeing Thomas drive away in the car and return on foot. Two witnesses saw him re-enter the woods with a shovel. A witness saw the three move further into the woods and disappear from view. The defendant said in his taped statement that a shallow grave was dug and that he had the gun in his back pocket. The victim, still bound, was made to lie down in the grave.

The victim was pleading for his life when he was beaten and jabbed with a shovel in the head, throat and chest. The

defendant said in his taped statement that Thomas then took the gun from the defendant and fired at the victim's head. Witnesses heard three shots. The defendant said that the victim was again beaten and jabbed with the shovel. In his taped statement the defendant said that the victim knew what was happening as he lay in his grave and that he was pleading with them to stop. The victim was then buried alive. The distance from the trailer where the robbery took place to the grave was over 150 yards.

It appears from the evidence of the forensic autopsy that one bullet struck the victim, entered his upper right jaw through the lip directly below the right nostril and dislodged two teeth. The autopsy revealed severe bruises, scrapes and curved lacerations on the victim's head, face and neck. The breastbone was broken in two with associated internal hemorrhaging. There had been internal hemorrhaging about the lower right ribcage and the right collarbone. The autopsy evidence indicated that two lacerations of the head went to the skull bone which was fractured in these areas. The crushed bone had damaged the brain and caused internal hemorrhaging over the brain. The autopsy revealed that an event similar to a blow to the head with a hammer had crushed the skull in the temporal region above the left ear. The victim's

windpipes and throat contained large amounts of dirt and blood so that smaller areas of both lungs were completely closed. A moderate amount of dirt and blood was found in the upper end of the stomach. The cause of death was found to be suffocation.

1. The defendant contends that the verdicts are contrary to the evidence and without evidence to support them, are decidedly and strongly against the weight of the evidence, and are contrary to law and the principles of justice and equity. In accord with Ridley v. State, 236 Ga. 147 (1) (223 SE2d 131) (1976), Ingram v. State, 204 Ga. 164, 184 (48 SE2d 891) (1948), we find that the evidence was sufficient to authorize the jury to return the verdicts of guilty of felony murder and kidnapping with bodily injury. However, the conviction for armed robbery must be set aside as being contrary to law in that a person cannot legally be convicted and sentenced for both a felony murder and the lesser included felony on which that felony murder conviction is based, the armed robbery in this case. Atkins v. Hopper, 234 Ga. 330 (3) (216 SE2d 89) (1975); see also Burke v. State, 234 Ga. 512, 514-515, 518 (216 SE2d 812) (1975).

2. The defendant contends that the trial court erred in overruling his motion to suppress evidence of a statement he made on the third day after his arrest because it was made in a custodial interrogation without the benefit of counsel. A tape recording of the statement was allowed to be played to the jury and a transcript of the tape recording was allowed in evidence.

The beginning of the statement complained of contains a waiver of fifth and sixth amendment rights. In this portion of the statement the sheriff read the Miranda rights to the defendant one at a time from a waiver form the defendant had previously signed and, after each right, the defendant answered that he understood that right. The sheriff then read affirmations from the form that his statement was voluntary, that it was not being induced by another, that it was made without his being promised the slightest hope of benefit, and that it was not induced by the remotest fear of injury. The defendant responded affirmatively to the sheriff. The sheriff read to the defendant from the form that the defendant had freely and voluntarily waived his right to counsel and that no threats or promises had induced the waiver. The defendant was asked if he had signed that statement form, and he replied, yes. He was then asked, "Are you willing to talk with us?" He responded, "Yes, sir."

Although the interrogation was custodial, it was not conducted in isolation. The evidence indicates the defendant's taped statement was made in the sheriff's office during the day. The tape contains noises from the police radio and from the telephone in the sheriff's office. There is evidence of short interruptions while other business was attended. The taped statement does not indicate that the defendant was compelled in any manner to be a witness against himself.

The defendant argues that Escobedo v. Illinois, 378 U. S. 478 (84 SC 1758, 12 LE2d 977) (1964), and Brewer v. Williams, 430 U. S. 387 (SC , LE2d) (1977), require that the statement should have been suppressed. In those cases, the defendant had been denied the benefit of previously obtained counsel. In the case at bar, the defendant had not obtained counsel nor had there been any promise by authorities not to interrogate the defendant without the presence of his counsel. The defendant also urges that Miranda v. Arizona, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966), requires that the statement be suppressed even though no counsel had been obtained. We have carefully scrutinized the efforts of the state to comply with the procedural safeguards required by Miranda and find no failure to

meet the constitutional standards for the protection of the privilege against self-incrimination.

The defendant has attempted to show mental and literary weakness which would prevent an intelligent and knowing waiver of counsel. He introduced evidence that he had an IQ of 62, had a second grade reading ability, had experienced reading problems in the eighth grade and had difficulty writing coherently. The evidence also shows that the defendant was 20 years old, that he had completed the eleventh grade, that he wrote many letters from prison, and that he was able to communicate normally and respond intelligently to other persons. The trial court did not err in finding that the accused was offered counsel but intelligently and understandingly rejected the offer. Carnley v. Cochran, 369 U. S. 506 (82 SC 884, 8 LE2d 70) (1962); Hunt v. State, (32330, decided September 8, 1977); Miller v. State, (32711, decided November 1, 1977). The cases of Powell v. Alabama, 287 U. S. 45 (53 SC 55, 77 LE 158) (1932); Marshall v. Riley, 7 Ga. 367 (1849); and Smith v. State, 17 Ga. App. 693 (88 SE 42) (1915); are inapposite.

The trial court did not err in overruling a motion to suppress the statement made by the defendant during custodial interrogation.

3. The defendant contends that the trial court erred in overruling his motion to suppress the evidence of the taped statement on grounds that the prosecution did not establish the proper foundation for its admissibility, and because of errors in the tape.

The record contains ample evidence that the device used to make the tape was capable of recording an interrogation, the event which the evidence was tendered to portray. The persons operating the device were shown to be competent to do so. There was sufficient proof that the recording was preserved without alteration. After hearing the tape recording, the defendant testified that he made the statement that was recorded on the tape. A proper foundation was made for admissibility of the taped statement. See Harris v. State, 237 Ga. 718 (5) (230 SE2d 1) (1976).

The defendant has not contended that the tape recording did not accurately portray his statement. His evidence indicates only that, in general, tape recording devices are not perfect recorders of sound events. However, there was ample evidence of reliability and accuracy so that the trial judge did not err in overruling the defendant's objections on these grounds.

4. The defendant contends that he was denied the assistance of counsel for his defense. The defendant was arrested on April 14, 1976, two days after the crimes occurred. He was initially indicted on May 4. Counsel was appointed on June 22. The initial arraignment was held two weeks later on July 6, 1976. A challenge to the composition of the grand jury was sustained. The defendant was reindicted on November 29, 1976, following revision of the jury lists. His trial began January 13, 1977.

The defendant alleges that the court erred in not appointing an attorney upon his arrest, since his indigency should have been apparent, and because he was available for interrogation while in jail. We found in division 2 that the constitutional standards applicable to custodial interrogation were fully met in this case. All of the evidence indicates that the defendant made no request for counsel to any authority and that he declined the offers of assistance of counsel that were presented to him. We find that custodial interrogation is not sufficient reason to compel the defendant to accept counsel that he has waived. Miranda v. Arizona, supra; see also Faretta v. California, 422 U. S. 806 (95 SC 2525, 45 LE2d 562) (1975).

The defendant asserts that Fair v. Balkcom, 216 Ga. 721 (119 SE2d 691) (1961), would require that counsel be appointed

for him earlier than two weeks prior to his arraignment. Fair v. Balkcom, supra, was a murder case in which a suspect was arrested and indicted, pled guilty and was sentenced to death without the assistance of counsel and within a period of less than 63 hours. Finding that justice unnecessarily hastened is to be condemned as much as justice unnecessarily delayed, this court vacated the conviction. The court held that Fair had not waived the assistance of counsel for his defense and that the Constitution of Georgia directs that the privilege and benefit of counsel be afforded Fair. Ga. Const. of 1976, art. I, § I, par. XI; Code Ann. § 2-111. The court remarked that it was not called upon to decide just when the right to counsel commences, but indicated that counsel should be available after the indictment to assist the defendant with his arraignment. In the case now before us, counsel was appointed two weeks prior to the initial arraignment and afforded the defendant adequate assistance in his preparation for and plea of not guilty. Fair v. Balkcom, supra, is not applicable here. The defendant has not shown how, if at all, the delay in appointing counsel deprived him of the effective assistance of counsel. The defendant was not denied the assistance of counsel guaranteed by the sixth amendment.

5. The defendant contends that the court erred in admitting several pieces of physical evidence. A pair of gloves, one of which was found in the grave and the other near it, a pair of tennis shoes allegedly worn by the co-defendant Thomas, and the victim's bloody shirt are specifically complained about. From the transcript of the trial we find that when these items were offered in evidence the defendant had no objection. We also find that the exhibits complained of were evidence that the crimes charged in the indictment were committed and that their probative value justified whatever small effect of confusion or emotion these exhibits may have had on the jury. We cannot find that the trial court erred in admitting these exhibits. Herrin v. State, 230 Ga. 476 (1) (197 SE2d 734) (1973); West v. State, 232 Ga. 861 (1) (209 SE2d 195) (1974).

6. The defendant contends that the trial court granted the defendant's common law wife immunity from criminal prosecution in order to entice her to testify against the defendant and that the court improperly refused to allow her to be cross examined at the commencement of her testimony concerning her willingness to testify against the defendant. We assume without deciding that a common law marriage was shown.

The witness was represented by counsel and had been granted immunity. The transcript reveals that after the witness testified for the state the defendant's counsel asked her, "You have elected to take the stand and testify against him [defendant], haven't you?" She replied, "Yes, sir." The defendant was not denied the right to cross examine his spouse as to the voluntariness of her testimony.

In Young v. State, 232 Ga. 285 (206 SE2d 439) (1974), this court found that the privilege accorded spouses by Code Ann. § 38-1604 belongs to the spouse testifying in a criminal proceeding, not to the defendant. Thus the defendant may not assert error when the defendant's spouse voluntarily testifies against him.

The grant to a witness of immunity from prosecution results in compulsory testimony notwithstanding the privilege against being required to testify against one's self. The grant of immunity does not operate to compel one spouse to testify against another. State v. Smith, 237 Ga. 647 (229 SE2d 433) (1976). The witness was not compelled by the grant of immunity to testify against her spouse. We find no violation of Code § 38-1604. The trial court instructed the jury that they should scrutinize with care the testimony of a witness granted immunity as an inducement to testify. The trial court did not err in allowing the witness to testify over the defendant's objections.

7. The defendant contends that the district attorney made improper remarks to the jury in his opening and closing statements in the first phase of the trial. In his opening statement the district attorney informed the jury that the state was seeking the death penalty. He told them the aggravating circumstances he intended to prove and asked the jury to note evidence which supported the aggravating circumstances. In his closing argument the district attorney asked the jury to put themselves in the place of the victim who must have felt pain and to think of the loss to the victim's family. We find no error in the opening statement and no reversible error in the closing argument. Moreover, we find no objection to these comments made at trial. Therefore, the trial court was not called upon to consider whether the comments were error or to take any action. We therefore do not find that the trial court erred in allowing the comments of the district attorney. Pulliam v. State, 236 Ga. 460, 465 (224 SE2d 8) (1976); see Hill v. State, 237 Ga. 794 (5) (229 SE2d 737) (1976).

8. The defendant argues that the death penalty is unconstitutional. It was, however, upheld in Gregg v. Georgia, 428 U. S. 153 (SC , LE2d) (1976).

He argues that the death penalty for armed robbery has rarely been imposed in the past and cannot now be imposed under Floyd v. State, 233 Ga. 280, 285 (210 SE2d 810) (1974); Gregg v. State, 233 Ga. 117, 127 (210 SE2d 659) (1974); and Jarrell v. State, 234 Ga. 410, 424-425 (216 SE2d 258) (1975). The district attorney urges that the death penalty frequently has been imposed for armed robbery as evidenced by the number of cases in which we have set it aside. In the case before us, this issue is moot. See division 1 of this opinion. See also Coker v. Georgia, ____ U. S. ____ (45 USLW 4961, decided June 29, 1977).

9. Sentence Review. We must determine whether the sentences were imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537(c)(1).

The defendant contends that the comments of the district attorney in his opening statement and closing argument were inflammatory and unlawfully prejudicial. Although objections were not made at trial, we consider such matters in reviewing the death sentences, along with others which might appear. Code Ann. § 27-2537; Ross v. State, 233 Ga. 361, 367 (211 SE2d 356) (1974); Prevatte v. State, 233 Ga. 929, 931 (214 SE2d 365) (1975). However, the statements of the district attorney did not in our

opinion cause the jury to impose the sentences under the influence of passion, prejudice or any other arbitrary factor. See Jarrell v. State, 234 Ga. 410, 426, supra. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice or any other arbitrary factor.

We must also determine whether the evidence supports the jury's finding of aggravating circumstance. Code Ann. § 27-2537 (c)(2). The jury found that the defendant committed felony murder while engaged in the commission of other capital felonies, armed robbery and kidnapping with bodily injury, that the defendant committed the murder for himself for the purpose of receiving money and other things of value, and that the murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind of the defendant and torture to the victim. The jury found as aggravating circumstances supporting the death sentence for kidnapping that the kidnapping was committed while the defendant was engaged in the commission of other capital offenses, murder and armed robbery, and that the kidnapping was outrageously and wantonly vile, horrible, and inhuman in that the offense involved depravity of mind of the defendant and torture to the victim.

According to Gregg v. State, supra (233 Ga. at 127), where the aggravating circumstance authorizing the death penalty for one crime is a second crime, the first crime cannot then be used in aggravation of the second crime to support a second death penalty. However, according to Pryor v. State, 238 Ga. 698, 702-703 (234 SE2d 918) (1977), a lesser included offense may constitute an aggravating circumstance even though it may not be punished separately.

From the foregoing it can be seen that even eliminating the kidnapping from consideration as an aggravating circumstance supporting the death penalty for murder, the death penalties for both murder and kidnapping in this case are each independently valid under our law and are each amply supported by the evidence.

The death penalty for kidnapping with bodily injury is not unconstitutional where the victim is killed. See Coker v. Georgia, supra; Collins v. State, 239 Ga. 400 (SE2d) (1977).

We must also determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537(c)(3). In reviewing the death penalties in this case, we have considered the cases appealed to this court since

January 1, 1970, in which death or life sentences were imposed and we find the similar cases listed in the appendix support the affirmance of the death penalties in this case. Since kidnapping with bodily harm was made a capital offense by adoption of the 1968 criminal Code (Ga. L. 1968, pp. 1249, 1282), juries have imposed the death penalty for that crime in those similar cases listed in the appendix under the heading "kidnapping cases". The cases used in the comparison were cases where the defendant exhibited a complete disregard for human life.

Although Ivon Stanley had no prior criminal record, there was evidence showing that he was an active participant in the crimes: enticing the victim to the place of the robbery, handling the pistol, guarding the victim while Thomas moved the car, digging the victim's grave, and burying the victim while he was still alive and pleading for his life. Although the sheer savagery of Ivon Stanley's conduct may have been equalled by others, it has seldom if ever been exceeded. Ivon Stanley's sentences to death are not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

The judgments convicting the defendant of murder and kidnapping with bodily injury and imposing the sentences of death for each are affirmed. The judgment convicting the defendant of armed robbery is reversed. All the Justices concur.

APPENDIX

32260. STANLEY v. STATE

1. House v. State, 232 Ga. 140 (205 SE2d 217) (1974)
2. McCorquodale v. State, 233 Ga. 369 (211 SE2d 577) (1974)
3. Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974)
4. Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975)
5. Berryhill v. State, 235 Ga. 549 (211 SE2d 185) (1975)
6. Birt v. State, 236 Ga. 815 (225 SE2d 248) (1976)
7. Gibson v. State, 236 Ga. 874 (226 SE2d 63) (1976)
8. Harris v. State, 237 Ga. 718 (230 SE2d 1) (1976)
9. Young v. State, 237 Ga. 852 (230 SE2d 287) (1976)
10. Dix v. State, 238 Ga. 209 (232 SE2d 47) (1976)
11. Blake v. State, 239 Ga. 292 (SE2d) (1977)
12. Young v. State, 239 Ga. 53 (236 SE2d 1) (1977)

KIDNAPPING CASES

13. Henderson v. State, 227 Ga. 68 (179 SE2d 76) (1970)
14. Akins v. State, 231 Ga. 411 (202 SE2d 62) (1973)
15. Eberheart v. State, 232 Ga. 247 (206 SE2d 12) (1974)*
16. Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975)
17. Peek v. State, 32150 decided September 6, 1977

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*Although the death penalty in Eberheart v. State, supra, was set aside because no death was involved, Eberheart v. Georgia, ____ U. S. ____, it is a case in which the jury imposed the death penalty for kidnapping with bodily injury.

THE COURT:

Mr. Stacy?

MR. STACY:

Ladies and gentlemen of the jury, I know this has been a trying case for you. I know it has been for me. I know you have had an unpleasant duty to do, one that no doubt you didn't want to do. You did it because you were summoned here.

But I'm not going into the evidence any further in this case because you heard it all. And you have been aware of anything that has gone on in here. You have listened to each and every individual witness. You have weighed and evaluated evidence. And you have made your findings.

As for me, this is the first time I've ever been involved in a capital offense where the death penalty has been called for. I have done my duty. I'll walk out of this Courtroom today feeling that I have even gone

overboard against my friends, against those I sit in church with, against those I have sat in the lodge with, against those I have broken bread with. When you can no longer hear Mr. Cato's voice, all when it's silent, you can hear him no longer pounding with the harmer on the table, when the whole place is silent, is it going to be silent with you? If you can bring in a death sentenc or bring in a sentence without mercy?

I knew Clifford Floyd, I knew him well. And I don't believe Clifford Floyd ever had in his heart the Latin phrase, an eye for an eye and a tooth for a tooth. I don't believe he ever thought of that. If you've ever read church history, at the time that our Master was crucified, they had the same lawlessness in and around Jerusalem that they have in this country today. Old Pilot was a hatchet man of Caesar's. He had the supreme power of life and death. He was judge, jury and the executioner. He was all powerful. The death penalty had been taken away from the Jews. The Sanhedrin couldn't pronounce the death sentence. And Jesus was brought before him. Pilot didn't want the responsibility. Take him and try him under your law. The Jews replied to him, the Sanhedrin replied to him, you know the death penalty has been taken away from us. And if you will remember, old Pilot wanted to wash his hands of it. His good wife sent him a message that says have

JERRY BOTRUCK
PAUL RAYBORN
EUGENIA LAWRENCE
PAULINE TAUL
BARBARA EVANS
LINDA ADAMS

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TALLAHASSEE, FLA. 32302

nothing to do with this innocent man. I've had a dream concerning him this night. So he tried to shift his responsibility to somebody else. He said take him away and crucify him. And then, ladies and gentlemen of the jury, he got him a pan of water and washed his hands. If it should ever appear and in your mind and in your conscience, when, at any time you reflect back in the dark of the night and say, was I absolutely right on this thing? Was I absolutely right on this thing? This man, we can about Brother Floyd, sleep on, Brother Floyd, sleep on. But this man, whom I consider an imbecile, you can refuse him mercy if you want to, that's your prerogative. But I can hear his footprints going down as they march him down to that death chair and I can hear that cry that Brother Floyd cried. You've got my money. He won't be saying it then. He'll be saying, have mercy, have mercy. You have the right to bring in a vote of mercy for this man. You can do it whether or not you want to. That's your prerogative.

My duty to this man, I've already rendered it. I don't have to wash my hands. I think his people there will say I've done the best I could do. I thank you.

WAIVER OF COUNSEL BY DEFENDANT IN CUSTODY

I, [illegible], have been informed by the undersigned law enforcement officers, prior to being questioned by them that I am suspected of the offense of [illegible] in [illegible] County, Georgia, on the [illegible] day of April 1976 and have been informed by them of my Rights as follows:

1. That I may remain silent and do not have to make any statement at all.
2. That any statement which I might make may be used against me in court.
3. That I have the right to consult with an attorney before making any statement and to have such attorney present with me while I am making a statement.
4. That if I do not have enough money to employ an attorney, I have the right to have one appointed by the Court to represent me; to consult with him before making any statement; and to have him present with me while I am making a statement.
5. That if I request an attorney, no questions will be asked me until an attorney is present to represent me.
6. That I make this statement voluntarily, without being induced by another, or being promised the slightest hope of benefit or without having the remotest fear of injury.

After having my Rights explained to me, I freely and voluntarily waive my right to an attorney, I am willing to make a statement to the officers. I can read and write the English language and fully understand my Rights to an attorney. I have read this waiver of counsel and fully understand it. No threats or promises have been made to me to induce me to sign this Waiver of Counsel and to make a statement to the officers.

This 14th day of April 1976

[illegible]

All of the Rights in the above Waiver of Counsel were read and explained to the above defendant by me and he freely and voluntarily waived his right to an attorney. No threats, promises, tricks or persuasion were employed by me or anyone in my presence to induce him to waive his rights to an attorney and to make a statement without an attorney. He freely and voluntarily signed the above waiver of Counsel in my presence after having read it.

Bill H Turner

[illegible]

Title

Witnessed by: [illegible]

[illegible]

30-0112-01-76

827003

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
JUN 29 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IVON RAY STANLEY,

Petitioner,

-against-

WALTER D. ZANT, WARDEN,
Georgia Diagnostic and
Classification Center,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Ivon Ray Stanley, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals For The Eleventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Stanley's affidavit in support of this motion is attached hereto.

Melvin L. Wulf

June 28, 1983

No. 82_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

IVON RAY STANLEY,	)
	)
Petitioner,	)
	)
-against-	)
	)
WALTER ZANT, Warden, Georgia Dianostic Center,	)
	)
Respondent.	)
	)

I, Ivon Ray Stanley, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Decator County, a trial court of the State of Georgia, of felony murder and kidnapping with bodily injury, and was sentenced to death. I am being held at the Georgia Dianostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

Ivon Stanley

IVON RAY STANLEY

STATE OF GEORGIA

COUNTY OF BUTTS

The foregoing affidavit of Ivon Ray Stanley, was subscribed and sworn to before me this 23 day of June, 1983.

Notary Public

My Commission Expires 6-20-83